

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1957

No. 107

ELIZABETH DONNER HANSON, INDIVIDUALLY, AS
EXECUTRIX OF THE WILL OF DORA BROWNING
DONNER, DECEASED, ET AL., APPELLANTS,

vs.

KATHERINE N. R. DENCKLA, INDIVIDUALLY, AND
ELWYN L. MIDDLETON, AS GUARDIAN OF THE
PROPERTY OF DOROTHY BROWNING STEWART,
ETC.

APPEAL FROM THE SUPREME COURT OF THE
STATE OF FLORIDA

FILED APRIL 17, 1957.

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INDEX

	Original Print	
Proceedings in the Supreme Court of the State of Florida		
Caption	A	1
Record from the Circuit Court of the Fifteenth Judicial Cir- cuit in and for Palm Beach County, Florida, in Chan- cery	1	2
Bill for declaratory decree	1	2
Exhibit 1—Copy of last will and testament of Dora Browning Donner, dated December 3, 1949	14	12
Exhibit 2—Copy of agreement between Dora Browning Donner and Wilmington Trust Company, dated March 25, 1935 with Schedule "A" attached	20	17
Exhibit 3—Copy of power of appointment dated April 6, 1935, by Dora Browning Donner	28	24
Exhibit 4—Copy of power of appointment dated October 11, 1939 by Dora Browning Donner	35	30
Exhibit 5—Copy of Donner first power of appointment dated December 3, 1949, signed Dora B. Donner	37	31
Exhibit 6—Copy of Donner second power of appoint- ment dated July 7, 1950, and signed Dora B. Donner	41	35

Record from the Circuit Court of the Fifteenth Judicial Circuit in and for Palm Beach County, Florida, in Chancery—Continued

	Original	Print
Clerk's note re: Personal service of process on Elizabeth Donner Hanson, individually, et al.	44	37
Notice of suit	44	37
Order appointing Elizabeth Donner Hanson guardian ad litem for minor defendants Joseph Donner Winsor and Donner Hanson	46	39
Clerk's note re: Proof of publication	47	39
Motion of Elizabeth Donner Hanson, etc. et al., to dismiss suit	47	40
Decree pro confesso	50	41
Order appointing guardian ad litem for Paula Browning Denckla and William Donner Denckla, minors	51	42
Order postponing ruling upon motion of Elizabeth Donner Hanson, etc. filed February 18, 1954 until trial and final hearing	52	43
Transcript of proceedings, April 6, 1954	53	43
Appearances	54	43
Order of Supreme Court of Florida denying petition for writ of certiorari	62	47
Answer of Elizabeth Donner Hanson, etc., et al.	63	48
Complaint for declaratory judgment filed in the Court of Chancery of the State of Delaware in and for New Castle County	72	55
Motion to stay of defendants, Elizabeth Donner Hanson, etc., et al.	83	64
Application for injunction and other relief by plaintiffs	85	65
Reply of defendants to application for injunction	91	70
Certified copy of petition for permission to file such amended appraisement and inventory	96	74
Affidavit of William H. Foulk	98	75
Exhibit A—Letter from Wm. H. Foulk to Hon. E. Harris, Drew, dated November 28, 1952	102	79
Exhibit B—List of securities in said trust	104	81
Affidavit of Manley P. Caldwell	107	84
Amended appraisement and inventory	109	85
Order of County Judge's Court of Palm Beach County, Florida staying action	115	91
Answer of Wilbur E. Cook as guardian ad litem	117	93
Order discharging Wilbur E. Cook as guardian ad litem for defendant, Paula Browning Denckla	117	93
Injunctive order and order on motion to stay	118	94
Motion for summary final decree	119	95
Answer of Paula Browning Denckla	120	96
Corrected order of Supreme Court of Florida denying petition for writ of certiorari	121	96

Record from the Circuit Court of the Fifteenth Judicial Circuit in and for Palm Beach County, Florida, in Chancery—Continued

	Original	Print
Motion of certain defendants for summary final decree	192	97
Exhibit A—Affidavit of C. Kenneth Baxter	124	98
Exhibit B—Affidavit of Paul D. Lovett	129	102
Exhibit C—Affidavit of Joseph W. Chinn, Jr.	130	103
Certified copy of order of Court of Chancery for New Castle County, Delaware	135	107
Clerk's note re: Appearance of Edward McCarthy as associate counsel for Elizabeth Donner Hanson, as guardian ad litem	138	110
Summary final decree	138	110
Petition for rehearing by answering defendants	140	112
Motion to strike petition for rehearing	147	119
Order denying motion to strike and petition for rehearing	148	120
Notice of appeal to Supreme Court of Florida	148	120
Assignments of error and directions to clerk	150	121
Cross assignment of error and additional directions to the clerk	154	124
Clerk's certificate (omitted in printing)	155	125
Petition for writ of certiorari to review interlocutory order in Chancery	157	125
Petition for rehearing	164	129
Second petition for writ of certiorari to review interlocutory order in Chancery	168	131
Motion to remand	175	135
Exhibit A—Opinion, Herrmann, Acting Vice Chancellor, The Court of Chancery of the State of Delaware in and for New Castle County, dated December 28, 1955	181	140
Exhibit B—Judgment, The Court of Chancery of the State of Delaware in and for New Castle County, dated January 13, 1956	203	156
Exhibit C—Notice of and motion for new trial filed in The Court of Chancery of the State of Delaware in and for New Castle County, January 19, 1956	212	163
Exhibit D—Order denying motion for new trial filed in The Court of Chancery of the State of Delaware in and for New Castle County, dated January 25, 1956	218	168
Exhibit E—Praecipe filed in The Superior Court of the State of Delaware	221	170
Response of appellees to appellants' motion to remand; motion of appellees to dismiss said motion to remand	228	175
Opinion, Hobson, J.	239	181
Petition for extension of time to file petition for rehearing	252	192
Order extending time to file petition for rehearing	255	193
Petition for rehearing	257	193
Motion to strike petition for rehearing and to order a mandate sent to the lower court without delay	268	201

Original Print

Order denying petition for rehearing	272	204
Petition for stay of mandate	274	204
Order granting stay of mandate	277	205
Appellants' motion for leave to file extraordinary petition for rehearing	279	206
Appellants' extraordinary petition for rehearing	281	207
Opinion of Supreme Court of Delaware, Cause No. 8, 1956 in the case of Elizabeth Donner Hanson, etc., dated January 14, 1957 by Justice Wolcott	283	209
Appellees' motion to strike extraordinary petition for re- hearing	320	232
Order granting motion of appellees to strike appellants' extraordinary petition for rehearing	323	233
Notice of appeal	325	234
Clerk's certificate (omitted in printing)	332	237
Order postponing jurisdiction	333	238

Stipulation re part of the record to be printed	239
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IN THE SUPREME COURT OF
THE STATE OF FLORIDA

ELIZABETH DONNER HANSON, individually, as Executrix of the Will of DORA BROWNING DONNER, Deceased, and as Guardian ad litem for JOSEPH DONNER WINSOR and DONNER HANSON, and WILLIAM DONNER ROOSEVELT, individually, Appellants,

v.

KATHERINE N. R. DENCKLA, individually, and ELWYN L. MIDDLETON, as Guardian of the property of DOROTHY BROWNING STEWART, also known as Dorothy B. Stewart and Dorothy B. Rodgers Stewart, an incompetent person, Appellees.

AN APPEAL FROM THE CIRCUIT COURT OF
PALM BEACH COUNTY, FLORIDA

TRANSCRIPT OF RECORD—Filed May 2, 1955

Messrs. Caldwell, Pacetti, Robinson & Foster, Attorneys at Law, 501 Harvey Building, West Palm Beach, Florida, Attorneys for Appellants.

Mr. William H. Foulk, Attorney at Law, Delaware Trust Building, Wilmington, Delaware, Of Counsel for Appellants.

Messrs. McCarthy, Lane & Adams, Attorneys at Law, Atlantic National Bank Building, Jacksonville, Florida, Attorneys for Appellants.

Mr. C. Robert Burns, Attorney at Law, 1318 Harvey Building, West Palm Beach, Florida, Attorney for Appellees.

Messrs. Redfearn & Ferrell, Attorneys at Law, 550 Brickell Avenue, Miami, Florida, Attorneys for Appellees.

[fol. 1] IN THE CIRCUIT COURT OF THE FIFTEENTH JUDICIAL
CIRCUIT IN AND FOR PALM BEACH COUNTY, FLORIDA

IN CHANCERY No. 31,980

KATHERINE N. R. DENCKLA, individually, and ELWYN L. MIDDLETON, as guardian of the property of DOROTHY BROWNING STEWART, also known as Dorothy B. Stewart and Dorothy B. Rodgers Stewart, an incompetent person, Plaintiffs,

v.

WILMINGTON TRUST COMPANY, a Delaware corporation; LOUISVILLE TRUST COMPANY, a Kentucky corporation; DELAWARE TRUST COMPANY, a Delaware corporation; BRYN-MAWR HOSPITAL, a Pennsylvania corporation; THE DONNER CORPORATION, a Pennsylvania corporation; BENEDICT H. HANSON; JOHN STEWART; DORA BROWNING STEWART LEWIS; MARY WASHINGTON STEWART BORIE; MIRIAM V. MOYER; JAMES SMITH; DORA DONNER IDE; PAULA BROWNING DENCKLA; WILLIAM DONNER DENCKLA; WILLIAM DONNER ROOSEVELT; DONNER HANSON; JOSEPH DONNER WINSOR; WALTER HAMILTON; ELIZABETH DONNER HANSON, individually, and as executrix of the will of DORA BROWNING DONNER, deceased, Defendants.

[fol. 2] BILL FOR DECLARATORY DECREE—

Filed January 22, 1954

To the Above Styled Court, and to the Honorable Judges
Thereof:

The above named plaintiffs bring this bill for declaratory decree against the above named defendants, and respectfully allege:

1.

The defendant, Wilmington Trust Company, is a Delaware corporation with its principal office and place of business in Wilmington, Delaware.

The defendant, Louisville Trust Company, is a Kentucky corporation with its principal office and place of business in Louisville, Kentucky.

The defendant, Delaware Trust Company, is a Delaware corporation with its principal office and place of business in Wilmington, Delaware.

The defendant, Bryn-Mawr Hospital, is a Pennsylvania corporation with its principal office and place of business in Bryn Mawr, Pennsylvania.

The defendant, The Donner Corporation, is a Pennsylvania corporation with its principal office and place of business at 1710 Fidelity Trust Building, Philadelphia, Pennsylvania.

Diligent search and inquiry have been made to discover the true names, domiciles, principal places of business, and status of said foreign corporations, and the same are set forth above in this bill for declaratory decree as particularly as are known to the plaintiffs and to the affiant making the affidavit by which this bill for declaratory decree is verified. Diligent search and inquiry have also been made to discover the names and whereabouts of all persons upon whom service of process would bind said corporations, and the same are specified as particularly [fol. 3] as are known to the plaintiffs and said affiant. Said corporations are not qualified to do business in the State of Florida and none of the officers, directors, general managers, cashiers, resident agents and business agents of said corporations can be found within the state of Florida, and for this reason constructive service of process is sought upon said corporation, as provided by the statutes of the state of Florida.

The above named corporate defendants are named as defendants in their individual corporate capacities and as trustees representing various trusts as disclosed by this bill for declaratory decree, in order that they may be bound by any decree entered by this court, not only in their capacities as trustees, but also in their individual corporate capacities.

The defendant, Benedict H. Hanson, is a resident of the state of New York, now residing at 510 Park Avenue, New York, N. Y., Apartment B-4.

The defendant, John Stewart, is a resident of the state of Pennsylvania, now residing on Beachwood Road, Rosemont, Pennsylvania.

The defendant, Dora Browning Stewart Lewis, is a resident of the state of Maryland, now residing at 7000 Glendale, Chevy Chase, Maryland.

The defendant, Mary Washington Stewart Borie, is a resident of the state of Ohio, now residing at 6912 Madisonville Road, Marimont, Cincinnati, Ohio.

The defendant, Miriam V. Moyer, is a resident of the state of Pennsylvania, now residing at 1719 Fidelity Trust Building, Philadelphia, Pennsylvania.

[fol. 4] The defendant, James Smith, is a resident of the state of Pennsylvania, now residing at 221 Williams Road, Rosemont, Pennsylvania.

The defendant, Dora Donner Ide, is a resident of the state of New York, now residing at 485 Park Avenue, New York, N. Y.

The defendant, Paula Browning Denckla, is a minor, now twenty years of age. She resides at 5 East 67th Street, New York, N. Y.

The defendant, William Donner Denckla, is a minor, now nineteen years of age. He resides at 5 East 67th Street, New York, N. Y.

Said two minors, Paula Browning Denckla and William Donner Denckla, are the children of the plaintiff, Katherine N. R. Denckla.

Diligent search and inquiry have been made to discover the names and residences of the above named non-resident defendants, and the same are set forth above in this bill for declaratory decree as particularly as are known to the plaintiffs and to the affiant making the affidavit by which this bill for declaratory decree is verified. Constructive service of process on said non-resident defendants is sought, as provided by the statutes of the state of Florida.

The defendant, William Donner Roosevelt, is a resident of Palm Beach County, residing at South Ocean Boulevard, Palm Beach, Florida, and is more than twenty-one years of age.

The defendants, Donnera Hanson and Joseph Donner Winsor, are both minors, and they reside in Palm Beach

County with their mother, Elizabeth Donner Hanson, on South Ocean Boulevard, Palm Beach, Florida.

[fol. 5] The defendant, Walter Hamilton, is a resident of Palm Beach County, Florida, and is more than twenty-one years of age.

The defendant, Elizabeth Donner Hanson, is made a party defendant individually and as executrix of the will of Dora Browning Donner, deceased. The said Elizabeth Donner Hanson is a single woman residing on South Ocean Boulevard, Palm Beach, Florida, and is a resident of Palm Beach County, Florida.

2.

Dora Browning Donner died a citizen and resident of Palm Beach County, Florida, on November 20, 1952, leaving a Last Will and Testament dated December 3, 1949, a copy of which is hereto attached and made a part hereof and marked Exhibit "1". Said will was duly admitted to probate in the County Judge's Court in and for Palm Beach County, Florida, on December 23, 1952. At the date of her death and at all times subsequent to January 15, 1944, decedent had been a resident of and domiciled in Palm Beach County, Florida. Prior to taking up her domicile in Florida, she had been a resident and citizen of the State of Pennsylvania, and had been a resident of that state since prior to 1935. At all times subsequent to January 15, 1944 and up to the date of her death, decedent paid intangible taxes assessed in Palm Beach County, Florida, upon all of the intangibles forming a part of the assets of the trust described in the next paragraph of this bill for declaratory decree.

3.

On March 25, 1935, said Dora Browning Donner, then residing in Villa Nova, Pennsylvania, executed a trust agreement in which the defendant, Wilmington Trust Company, a Delaware corporation, was named as trustee. A [fol. 6] copy of said trust agreement is hereto attached and made a part thereof and marked exhibit 2. Said trust agreement, under its terms, existed only for the life of

the said Dora Browning Donner, and it provided that at her death the trust property described in said trust agreement would be disposed of as provided under the terms of her last will and testament, unless prior to her death she had executed a valid power of appointment making a different disposition of part or all of the trust property described in schedule "A" attached to said trust agreement.

Said trust agreement contained the following provision:

"1. Trustee shall hold, manage, invest and reinvest the trust fund, collect the income thereof and pay out of such income all taxes, charges and expenses payable thereout including compensation to Trustee as hereinafter provided.

"Trustee shall pay over the net income of the trust fund unto Trustor, for and during the term of her natural life. Upon the death of Trustor Trustee shall assign, transfer, convey and deliver this trust fund, principal and undistributed income thereof, if any, free from this trust, unto such person or persons and in such manner and amounts and upon such trusts, terms and conditions as Trustor shall have appointed by the last instrument in writing which she shall have executed and delivered to Trustee, or failing such instrument, by her last Will and Testament, or in default of any such appointment then unto the then living issue of Trustor, per stirpes and not per capita."

[fol. 7]

4.

Said Dora Browning Donner attempted to exercise the power of appointment reserved, as shown in the above quotation, and executed an alleged power of appointment, dated April 6, 1935, a copy of which is hereto attached and made a part hereof and marked exhibit 3. By the terms of said alleged power of appointment the said Dora Browning Donner attempted to provide for certain payments to be made to her executors and also

\$5,000.00 to be paid to the defendant, Bryn Mawr Hospital;

\$10,000.00 to be paid to the defendant, John Stewart;

\$10,000.00 to be paid to Louisville Trust Company, as trustee, for the benefit of the defendant, Dora Browning Stewart, now Dora Browning Stewart Lewis;

\$10,000.00 to be paid to Louisville Trust Company as trustee, for the benefit of the defendant, Mary Washington Stewart, now Mary Washington Stewart Borie;

\$10,000.00 to be paid to the defendant, Louisville Trust Company, as trustee, for the benefit of the defendant, Paul Browning Denckla;

\$10,000.00 to be paid to the defendant, Louisville Trust Company, as trustee, for the benefit of the defendant, William Donner Denckla;

\$10,000.00 to be paid to the defendant, Louisville Trust Company, as trustee, for the benefit of the defendant, William Donner Roosevelt;

\$10,000.00 for each grandchild of said trustor Dora Browning Donner, born after the date of said alleged power of appointment, April 6, 1935;

[fol. 8] and the balance of said trust to be divided into two equal parts, to be paid one-half to the defendant, Wilmington Trust Company, as trustee, for the benefit of the plaintiff, Katherine N. R. Denckla, who was named in the will of the deceased as Katherine N. R. Denckla Ordway, but whose name is now Katherine N. R. Denckla, and the other one-half to the defendant, Wilmington Trust Company, as trustee, for the benefit of the defendant, Dorothy Browning Stewart, all as shown by said alleged power of appointment above described as exhibit 3 and attached to this bill for declaratory decree and made a part hereof.

5.

By virtue of said power retained by the said Dora Browning Donner in the trust instrument dated March 25, 1935;

which provided that the last instrument in writing executed by her as a power of appointment would control the disposition of said trust assets, she again attempted to exercise her power of appointment on October 11, 1939, and in said attempted power of appointment she revoked and cancelled paragraph C of the power of appointment dated April 6, 1935, providing \$10,000.00 for the defendant, John Stewart, and increased the amount for said John Stewart to \$15,000.00, and added \$1,000.00 for James Smith. A copy of said alleged power of appointment is hereto attached and made a part hereof and marked exhibit 4.

6.

Thereafter, the said Dora Browning Donner again attempted to exercise said alleged power of appointment contained in said trust instrument dated March 25, 1935, providing that the last instrument in writing executed by her would control said trust assets, and she executed an alleged power of appointment designated "*Donner *First Power of Appointment*," dated December 3, 1949. In this alleged power of appointment she revoked all previous [fol. 9] exercises of said power of appointment, the same being those above mentioned, dated April 6, 1935, and later amended by the one dated October 11, 1939. She then provided in said alleged power of appointment, designated as "*Donner * First Power of Appointment*," for the disposition of said trust assets as follows:

- \$ 2,000.00 to the defendant, Miriam V. Moyer;
- \$ 1,000.00 to the defendant, James Smith;
- \$ 1,000.00 to the defendant, Walter Hamilton;
- \$ 1,000.00 to each of her servants who had been in her employ for more than two years at the time of her death;
- \$10,000.00 to the defendant, Louisville Trust Company, as trustee, for the benefit of the defendant, Benedict H. Hanson;

\$10,000.00 to the defendant, Bryn Mawr Hospital, Bryn Mawr, Pennsylvania, to endow a bed in honor of Dorothy B. Rodgers Stewart;

\$200,000.00 to the defendant, Delaware Trust Company, as trustee, for the benefit of Joseph Donner Winsor;

\$200,000.00 to the defendant, Delaware Trust Company, as trustee, for the benefit of the defendant, Donner Hanson.

Said alleged power of appointment then provided that the residue of the principal and undistributed income of said trust should be paid to the executrix of the last will and testament of the said Dora Browning Donner. A copy of said alleged power of appointment, described as "Donner [fol. 10] * First Power of Appointment," is hereto attached and made a part hereof and marked exhibit 5.

7.

Thereafter, the said Dora Browning Donner, by reason of the provision in said trust instrument, dated March 25, 1935, providing that the last instrument in writing which she should execute would control the disposition of said trust assets, again attempted to exercise said alleged power of appointment by executing a written instrument, dated July 7, 1950, and designated "*Donner * Second Power of Appointment.*" In this alleged power of appointment she revoked the \$10,000.00 to the defendant, Louisville Trust Company, as trustee, for the benefit of her son-in-law, Benedict H. Hanson, and she confirmed her alleged power of appointment dated December 3, 1949, in all other respects. A copy of said last alleged power of appointment is hereto attached and made a part hereof and marked exhibit 6.

8.

The defendant, Elizabeth Donner Hanson, is the executrix of the will of said deceased, a copy of which is attached to this bill for declaratory decree as exhibit 1, and she is made a party defendant for the purpose of binding her as

such executrix, and also binding her individually as to any rights that she may have as a result of the will, the trust agreement, and the alleged powers of appointment hereinabove mentioned.

Dora Donner Ide is made a party defendant by reason of the fact that she is named as a legatee in said will and in order to bind her by the terms and provisions of the decree to be entered in this case pertaining to the will, the trust instrument, and the powers of appointment hereinabove mentioned.

[fol. 11] The Donner Corporation, a Pennsylvania Corporation, is made a party defendant by reason of the fact that item *Eighth* of said will names it as the sole adviser of the trustee for the trust created in said will, and in order that it may be bound by the terms of the decree to be entered in this case with reference to said will, trust agreement, and powers of appointment hereinbefore mentioned.

In Item I of the first alleged power of appointment, dated April 6, 1935, and attached as exhibit 3 to this bill for declaratory decree, the trustor provided \$10,000.00 for each grandchild of the trustor born after April 6, 1935. Plaintiff alleges that all grandchildren born to said trustor after that date have been made parties defendant in this case.

In Item (iv) of the power of appointment known as "Donner * First Power of appointment," dated December 3, 1949, attached as exhibit 5 to this bill for declaratory decree, provision is made for \$1,000.00 to be paid to each servant who shall have been in the employment of the trustor, Dora Browning Donner, for a period of more than two years prior to her death. Plaintiffs allege that there are no such servants, and for that reason none are made parties defendant in this case.

9.

Plaintiffs allege that questions and doubts have arisen concerning what property passes under the residuary clause of the Last Will and Testament of the decedent, Dora Browning Donner, particularly that part of the residuary clause which purports to cover property over which the decedent had powers of appointment and which she had

failed to exercise effectively in her lifetime. If, as to the trust described in paragraph numbered 3 of this bill for [fol. 12] declaratory decree, the decedent, during her lifetime, effectively and validly exercised powers of appointment thereunder, only a portion of property in such trust passes under the residuary clause. If, on the other hand, one or more of the exercises of power of appointment shown on Exhibits 3, 4, 5, and 6, attached to this bill for declaratory decree, were ineffective or invalid for any reason, then additional portions of the trust property passes under the residuary clause of the decedent's will.

In this connection plaintiffs respectfully allege that each of the several alleged exercises of powers, shown on Exhibits 3, 4, 5, and 6, attached to this bill for declaratory decree, is testamentary in character and each provides it is not to take effect until after the death of the settlor, the said Dora Browning Donner. Thus, since each is testamentary in form, each must be executed in the manner required by the applicable law for testamentary dispositions. Questions have arisen as to which is the proper law to be applied; whether the law of Pennsylvania where the settlor resided at the time the trust was created and at the time the first two of the exercises were made, or the law of Florida to which she later moved her domicile and where she exercised the last two alleged powers of appointment above mentioned, or the law of Delaware where the trustee has its place of business, the law of each of such states varying on the point in question, Florida and Delaware requiring two witnesses for testamentary dispositions and Pennsylvania none. Revocation of a testamentary instrument may also be made under the laws of Pennsylvania by an unattested written instrument signed by a testator. In the case of each of the exercises here in question, there was only one witness.

Unless the Court shall by its decree determine what portion of the trust property passes under the residuary clause of the decedent's will, plaintiffs are without remedy; similarly, [fol. 13] if any such exercises are invalid, whereby certain property of the trust become assets of the residuary estate of the decedent, it is important to capture the same for the benefit of the estate prior to the discharge of the

defendant executrix who has failed to take any steps to do so, and who takes the position that all of such exercises are valid and fully effective.

Wherefore, Plaintiffs pray:

1. That the Court construe and determine the question of what portion of the trust property involved herein passes under the residuary clause of the will of the decedent.
2. That the Court grant such further or supplemental relief as may be necessary or proper.

C. Robert Burns, Redfearn & Ferrell, By D. H. Redfearn, Attorneys for Plaintiffs.

Duly sworn to by Elwyn L. Middleton, jurat omitted in printing.

[fol. 14] EXHIBIT 1 TO BILL FOR DECLARATORY DECREE

I, DORA BROWNING DONNER, of Palm Beach, Florida, do make, publish and declare this as and for my Last Will and Testament, hereby revoking and making void any and all Wills by me at any time heretofore made.

FIRST: I order and direct that all my just debts and funeral expenses be paid as soon after my death as conveniently may be

SECOND: It is my desire that I be buried in St. David's Cemetery, Radnor, Pennsylvania, next to the grave of my son, William H. Donner, Jr.

THIRD: I direct my Executrix to see that an appropriate marker be placed on my grave.

FOURTH: I gave and bequeath all of my personal and household effects, including clothing, jewelry, silverware, furniture and automobiles, unto my daughters, ELIZBETH DONNER HANSON and DORA DONNER IDE, or the survivor of them, to be divided between them, if both are living, as they may agree.

FIFTH: All the rest, residue and remainder of my estate, real, personal and mixed, whatsoever and wheresoever the same may be at the time of my death, including any and all property, rights and interest over which I may have power of appointment which prior to my death has not been effectively exercised by me or has been exercised by me in favor of my Executrix, I direct my Executrix to deal with as follows, namely:

(a) Thereout to pay all estate, inheritance, transfer, or other succession taxes or death duties, State and Federal, which by reason of my death shall become payable upon or with respect to the property appointed by me by exercise of the power of appointment provided in my favor in paragraph 1 of a certain trust agreement entered into between [fol. 15] me and Wilmington Trust Company, a Delaware corporation, as trustee on the 25th day of March, 1935;

(b). To divide the balance into two equal parts;

And I give and bequeath one of said parts to Delaware Trust Company, a corporation of the State of Delaware, its successors and assigns, trustee of a certain trust dated August 6, 1940, numbered 8555, for the benefit of my daughter KATHERINE N. R. DENCKLA ORDWAY, to be held, administered and/or distributed by it subject to all the trusts, uses, terms and conditions set forth in said trust;

I give and bequeath the remaining part unto my Executrix, IN TRUST, NEVERTHELESS, during the lifetime of my daughter DOROTHY B. RODGERS STEWART, to hold, manage, invest and re-invest the balance, to collect the income thereof and, after paying out of such income all charges and expenses properly payable therefrom, to apply the next income therefrom and/or a part of the principal thereof to the support and maintenance, benefit and/or comfort of my said daughter DOROTHY B. RODGERS STEWART, in such amounts, at such times and in such manner as my daughter, KATHERINE N. R. DENCKLA ORDWAY and after her death, the person occupying the office of Treasurer of The Donner Corporation, shall direct, and to accumulate and add to the principal the balance of such net income not so applied; and upon the death of my said daughter DOROTHY B.

RODGERS STEWART, or upon my death if she do not survive me, to pay over the remaining principal and undistributed income, if any; unto said Delaware Trust Company, its successors and assigns, trustee of said trust dated August 6, 1940, numbered 8555, for the benefit of my said daughter KATHERINE N. R. DENCOLA ORDWAY, to be held, administered and/or distributed by it subject to all trusts, uses, terms and conditions set forth in said trust numbered 8555.

[fol. 16] SIXTH: I authorize and empower the Executrix of this my Will and the Trustee of the trust herein created, in her discretion:

(a) To retain any and all stocks, bonds, notes, securities and/or other property constituting my estate immediately after my death, without liability for any decrease in value thereof.

(b) To sell at public or private sale, exchange for like or unlike property, convey, lease for terms longer or shorter than the trust, and otherwise dispose of any or all property, real or personal, held in the estate by her administered, for such price and upon such terms and credits as may be deemed proper.

(c) To hold uninvested any money available for investment in the trust fund or to invest such money in such stocks, bonds, notes, securities and/or other property as may be deemed appropriate for the trust fund, irrespective of the rules of investment applying to trustees under any present or future laws of any jurisdiction and without any duty to diversify investments.

(d) To participate in any plan or proceedings for protecting or enforcing any right, obligation or interest arising from any stock, bond, note or security held in the estate by her administered, or for reorganizing, consolidating, merging, or adjusting the finances of any corporation issuing the same, to accept in lieu thereof any new or substituted stocks, bonds, notes, and/or securities, whether of the same of a different kind or class, or with different priorities, rights or privileges, to pay any assessment or any expense incident thereto, and to do any other act or thing that may be deemed necessary or advisable in connection therewith.

(e) To borrow money for such periods of time and upon [fol. 17] such terms or conditions as may be deemed advisable for the purpose of paying any taxes chargeable to the estate by her administered, or for the purpose of taking up subscription rights accruing upon any stock or security held therein, or for the protection preservation or improvement of the estate by her administered, and she may mortgage or pledge such part or the whole of such estate as may be required to secure such loan or loans.

(f) To vote directly or by proxy at any election or stockholders' meeting any shares of stock held hereunder.

(g) To pay any legacy and to make any division or distribution of the estate by her administered in cash or in kind, or partly in cash and partly in kind, and to value and apportion the property to be so divided or distributed, which valuation and apportionment shall be final and conclusive upon all persons and corporations interested therein.

(h) To retain any and all property constituting the trust funds in bearer form, or in her own name, or in the name of her nominee or nominees, without disclosing any fiduciary capacity; and her liability as Executrix and/or Trustee shall be neither increased nor decreased thereby.

SEVENTH: The executrix of this my Will and/or the Trustee of the trust herein created shall exercise the powers heretofore granted to her in subdivisions (b) to (f) of Paragraph SIXTH hereof only upon the written direction of or with the written consent of the adviser hereinafter named; provided, however, if at any time there shall be no adviser or if the adviser shall fail to give any written direction or to communicate in writing to said Executrix and/or Trustee its consent or disapproval as to the exercise of any of the aforesaid powers, for which exercise the direction or consent of such adviser shall be necessary, within ten days after said Executrix and/or Trustee shall have sent to the adviser, by registered mail at its last known address, a [fol. 18] written request for such consent, then the Executrix and/or Trustee is hereby authorized and empowered to take such action in the premises as she, in her discretion,

shall deem to be for the best interest of the beneficiary or beneficiaries of the trust created hereunder.

EIGHT: The Donner Corporation, a corporation of the Commonwealth of Pennsylvania, shall be the sole adviser of the trust herein created. My said adviser shall be paid annually by my Trustee a reasonable fee in an amount to be agreed upon by my adviser and Trustee in compensation of its services and expenses as such adviser.

NINTH: I direct that:

(a) No person or corporation dealing with the Executrix of this Will and/or the Trustee of the trust herein created shall be obliged to see to the application of any money paid or property delivered to such Executrix or Trustee, or to inquire into the necessity or propriety of such Executrix or trustee exercising any of the powers herein conferred upon her, or to determine the existence of any fact upon which such Executrix' or Trustee's power to perform any act hereunder may be conditioned.

(b) The principal of my estate or of the trust herein created shall be credited with any stock dividends or subscription rights or distribution of principal or discounts received on investments from time to time held as a part hereof, and such principal shall likewise be charged with any premium on any such investments.

(c) My said Trustee shall not create or accumulate any sinking fund to offset any premiums at which she may make purchases of securities in the trust estate herein created.

LASTLY: I hereby nominate and appoint my daughter, ELIZABETH DONNER HANSON, to be the Executrix of this my Last Will and Testament, and direct that she be not required to give bond with surety before receiving letters [fol. 19] testamentary on my estate.

IN WITNESS WHEREOF, I, the said DORA BROWNING DONNER, have hereunto set my hand and seal this third day of December in the year of our Lord, one thousand nine hundred and forty-nine (1949).

/s/ DORA B. DONNER

Signed, sealed, published and declared by the above named DORA BROWNING DONNER as and for her Last Will and Testament, in our presence, who, in her presence, at her request, and in the presence of each other, have hereunto set our hands as witnesses, the day and year last aforesaid.

/s/ DOROTHY DOYLE R.N.
4527 Frankford Ave., Phila., Pa.

/s/ LYDE MACFARLAND
1028 E. Elm Street
Conshohocken, Pa.

[fol. 20] EXHIBIT 2 TO BILL FOR DECLARATORY DECREE

THIS AGREEMENT, made this 25th day of March, A. D., 1935, between DORA BROWNING DONNER, of Villa Nova, Pennsylvania, party of the first part, hereinafter called "Trustor", and WILMINGTON TRUST COMPANY, a corporation of the State of Delaware, party of the second part, hereinafter called "Trustee", WITNESSETH:

WHEREAS, Trustor desires to establish a trust of certain securities and property described in "Schedule A" annexed hereto and made a part hereof, which securities and property, together with the investments, reinvestments and proceeds thereof, and such other securities and property as may hereafter be received by Trustee hereunder, are hereinafter called the "trust fund":

NOW, THEREFORE, in consideration of the premises, the mutual covenants hereinafter set forth and the sum of One Dollar (\$1.00) by Trustee to Trustor in hand paid, the receipt whereof is hereby acknowledged, Trustor has assigned, transferred and delivered, and by these presents does assign, transfer and deliver the securities and property described in said "Schedule A" unto Trustee and its successors, IN TRUST, NEVERTHELESS, for the following uses, intents and purposes, that is to say:

1. Trustee shall hold, manage, invest and reinvest the trust fund, collect the income thereof and pay out of such income all taxes, charges and expenses payable thereout including compensation to Trustee as hereinafter provided.

Trustee shall pay over the net income of the trust fund unto Trustor, for and during the term of her natural life. Upon the death of Trustor Trustee shall assign, transfer, convey and deliver this trust fund, principal and undistributed income thereof, if any, free from this trust, unto such [fol. 21] person or persons and in such manner and amounts and upon such trusts, terms and conditions as Trustor shall have appointed by the last instrument in writing which she shall have executed and delivered to Trustee, or failing such instrument, by her last Will and Testament, or in default of any such appointment then unto the then living issue of Trustor, per stirpes and not per capita.

In the event of the death of the said Trustor without having exercised the power of appointment hereinbefore upon her conferred, and without leaving surviving her any issue of hers, then upon the death of the said Trustor, Trustee shall assign, transfer, convey and deliver the trust fund, principal and undistributed income thereof unto the next of kin of said Trustor.

2. Subject to the provisions and limitations herein expressly set forth, Trustee shall have, in general, the power to do and perform any and all acts and things in relation to the trust fund in the same manner and to the same extent as an individual might or could do with respect to its own property. No enumeration of specific powers herein made shall be construed as a limitation upon the foregoing general power, nor shall any of the powers herein conferred upon Trustee be exhausted by the use thereof, but each shall be continuing.

Trustee is specifically authorized and empowered, in its sole discretion, except as hereinafter otherwise provided in paragraph "4" hereof:

(a) To retain any and all stocks, bonds, notes, securities and/or other property constituting the original trust fund or added thereto, without liability on the part of Trustee for any decrease in value thereof.

[fol. 22] (b) To sell at public or private sale, exchange for like or unlike property, convey, lease for terms longer or shorter than the trust, and otherwise dispose of any or all property, real or personal, held in the trust fund, for such price and upon such terms and credits as Trustee may deem proper.

(c) To invest the proceeds of any such sale or sales, and any other money available for investment, in such stocks, bonds, notes, securities and/or other income producing property as may be deemed appropriate for this trust fund, irrespective of the rules of investment applying to trustees under any present or future laws of the State of Delaware or elsewhere.

(d) To vote directly or by proxy at any election or stockholders' meeting any shares of stock held hereunder.

(e) To participate in any plan or proceeding for protecting or enforcing any right, obligation or interest arising from any stock, bond, note or security held in the trust fund, or for reorganizing, consolidating, merging or adjusting the finances of any corporation issuing the same, to accept in lieu thereof any new or substituted stocks, bonds and/or securities, to pay any assessment or any expense incident thereto, and to do any other act or thing that Trustee may deem necessary or advisable in connection therewith.

(f) To determine whether expenses and other disbursements shall be charged against principal or income, or partly against principal and partly against income, and such determination shall be conclusive upon all persons and corporations interested therein.

(g) To take and to hold any security or other property constituting a part of the trust fund, in bearer form or in its own name or in the name of its nominee or nominees, without disclosing its fiduciary capacity, and Trustee's [fol. 23] liability shall be neither increased nor decreased thereby.

3. Trustor and/or any other person may at any time and from time to time add to the trust fund by devising, bequeathing, assigning, transferring, conveying, delivering

or making payable to Trustee cash, securities, provided such securities are fully paid and non-assessable, and/or other property and all such cash, securities and/or property shall be held by Trustee subject to the terms of this trust.

4. Trustee shall exercise the powers hereinbefore granted to it in subdivisions (b), (c) and (e) of Paragraph "2" hereof only upon the written direction of, or with the written consent of the adviser of the trust; provided, however, that if at any time during the continuance of this trust there shall be no adviser of the trust, or if the adviser of the trust shall fail to give any written direction or to communicate in writing to Trustee his or her consent or disapproval as to the exercise of any of the aforesaid powers for which exercise the direction or consent of such adviser shall be necessary, within ten days after Trustee shall have sent to the adviser of the trust, by registered mail, at his or her last known address, a written request for such consent, then Trustee is hereby authorized and empowered to take such action in the premises as it, in its sole discretion shall deem to be for the best interest of the beneficiary of this trust.

5. The adviser of the trust shall be William H. Donner, husband of Trustor, or such other person or persons as Trustor may nominate in writing delivered to Trustee during her lifetime; and such other person or persons so nominated shall become the adviser or advisers of this trust at such time and upon the happening of such conditions as the said Trustor may specify in writing.

[fol. 24] 6. No person or corporation dealing with Trustee shall be obliged to see to the application of money paid or property delivered to Trustee, to inquire into the necessity or the propriety of Trustee exercising any of the powers herein conferred upon it, or to determine the existence of any fact upon which Trustee's power to perform any act hereunder may be conditioned.

7. Any stock dividends or subscription rights or distribution of principal which may be received by Trustee on investments from time to time held by it hereunder shall be added to and form a part of the principal of said trust fund and shall be subject to the trust herein created.

8. Trustee shall charge all premiums and credit all discounts on investments against or to principal, as the case may be, but not against or to income; and Trustee shall not be required to create any reserve out of income for depreciation, obsolescence, amortization or other waste of principal.

9. Trustee shall be liable only for acts or omissions done or permitted to be done by it hereunder in bad faith, but shall not be liable for acts or omissions done or permitted to be done in good faith.

10. Trustor reserves the right to amend, alter or revoke this agreement in whole or in part at any time or times by written instrument signed by the principal and delivered to Trustee; provided, however, that the duties, powers, liabilities and compensation of Trustee hereunder shall not be substantially changed without its written consent.

11. The Trustor shall have the right to change from time to time the Trustee hereunder, to any successful Trust Company (of any state) that has been in business not less than ten years and has capital and surplus of not less than three million dollars; and in the event this right to change the Trustees is exercised, the Trustee then in office shall [fol. 25] be entitled to ninety days prior notice in writing, unless such notice is waived by it; whereupon the said retiring Trustee shall transfer, assign and deliver all the moneys, securities and properties then subject hereto to such Trustee as shall be then designated, which successor Trustee shall hold the said trust subject to all the conditions herein, to the same effect as though now named herein, and the retiring Trustee, having fully accounted, shall be relieved after such delivery, transfer and assignment from all and every liability on account of all matters pertaining to the execution of the trust.

12. It is hereby agreed that Trustee shall receive as compensation for its services percentum of the gross income received by it from said trust fund and upon distribution of a part or all of said trust fund Trustee shall receive a sum equivalent to one percentum of the principal

so distributed. Trustee shall also be entitled to receive a reasonable compensation for any extraordinary services performed by it hereunder.

13. Trustee accepts this trust and agrees to perform same in accordance with its terms and conditions.

IN WITNESS WHEREOF, DORA BROWNING DONNER, Trustor, has hereunto set her Hand and Seal, and WILMINGTON TRUST COMPANY, Trustee, has caused this agreement to be signed in its name by one of its Vice-Presidents and its corporate seal to be hereunto affixed by one of its Assistant Secretaries, all done in duplicate on the day and year first above written.

WITNESS: _____ (seal)

WILMINGTON TRUST COMPANY

By

Vice-President

ATTEST

Asst. Secy.

[fol. 26] SCHEDULE A TO EXHIBIT 2

112	30/50	shares American Gas & Electric Company
25	shares	American Steamship Company Capital
30	"	Consolidated Gas Company of New York Common
10	"	The Horn & Hardart Company Capital
100	"	Lone Star Gas Corporation 6½% Preferred
5	"	Mission Corporation Common
100	"	Standard Oil Company of New Jersey Capital
478	"	Sun Oil Company 6% Preferred
160	"	United States Steel Corporation Common
\$2,000		City of Camden, New Jersey Harbor Improvement 5½'s, due August 1, 1956

- \$7,000 Crucible Steel Company of America Debenture
5's due May 1, 1940
- \$16,000 Donner Steel Co. Inc. First Refunding 7's "A"
due January 1, 1942.
- \$15,000 Goodell Realty Corporation First 6's
\$ 1,000 due October 1, 1940
2,000 " April 1, 1941
10,000 " October 1, 1941
2,000 " April 1, 1942
- \$5,000 Lexington Water Power Company First 5's due
January 1, 1968
- \$15,000 Lloyds Finance Corporation Guaranteed 6's,
Series "A" due October 1, 1936.
- \$20,000 City of Montgomery, Ala. Public Improvement
Refunding 5½'s.
\$18,000 due July 1, 1958
2,000 " July 1, 1953
- \$15,000 New York Water Service Corporation First 5's
"A" due November 1, 1951
- [fol. 27] \$100,000 City of Seattle, Wash. Municipal Light
& Power Bond 1927 Series LU-1
\$ 5,000 due October 1, 1938
3,000 " October 1, 1940
10,000 " October 1, 1943
12,000 " October 1, 1944
10,000 " October 1, 1945
10,000 " October 1, 1949
20,000 " October 1, 1953
25,000 " October 1, 1958
5,000 " October 1, 1959
- \$25,000 United States Rubber Co. 6½'s, Series "O",
March 1, 1940
- \$15,000 West Virginia Water Service Co. 1st 5's "A",
Aug. 1, 1951

[fol. 28] EXHIBIT 3 TO BILL FOR DECLARATORY DECREE

WHEREAS, I, the undersigned, DORA BROWNING DONNER, of Villa Nova, Pennsylvania, as Trustor, entered into a certain trust agreement with WILMINGTON TRUST COMPANY, a Delaware corporation, as Trustee on the 25th day of March, 1935; and

WHEREAS, paragraph 1 of said trust agreement provided among other things as follows:

"Upon the death of Trustor Trustee shall assign transfer, convey and deliver this trust fund, principal and undistributed income thereof, if any, free from this trust, unto such person or persons and in such manner and amounts and upon such trusts, terms and conditions as Trustor shall have appointed by the last instrument in writing which she shall have executed and delivered to Trustee, . . ."

and

WHEREAS, I hereby desire to exercise the foregoing power of appointment which I reserved in said trust agreement:

NOW, THEREFORE, I, the undersigned, Dora Browning Donner, in consideration of the premises and the mutual covenants in said trust agreement dated March 25, 1935 set forth, do hereby exercise the power of appointment which I reserved in paragraph "1" of said trust agreement dated March 25, 1935, and in the exercise of same I do hereby direct Wilmington Trust Company, Trustee under said trust agreement dated March 25, 1935, upon my death, to hold, administer and/or distribute the principal and net income of the trust fund from and after my death as follows:

A:- To pay over unto the Executor or Executors of my estate such amount or amounts as such Executor or Executors may request in writing delivered to the Trustee of said trust dated March 25, 1935 prior to the expiration of six months after my death;

[fol. 29] B:- As soon as conveniently may be, to pay over the sum of Five Thousand Dollars (\$5,000.00) unto the Bryn

Mawr Hospital of Bryn Mawr, Pennsylvania, to be used by said hospital to endow a bed for the benefit of young boys, said bed to be inscribed "In memory of William H. Donner, Jr., given by his mother, Mrs. Dora Browning Donner";

C:- As soon as conveniently may be to pay over the sum of Ten Thousand Dollars (\$10,000.00) unto John Stewart, presently residing in Radnor, Pennsylvania, his heirs, executors, administrators or assigns;

D:- As soon as conveniently may be to pay over the sum of Ten Thousand Dollars (\$10,000.00) unto Louisville Trust Company of Louisville, Kentucky, Trustee under agreement with William H. Donner dated September 28, 1934, for the benefit of Dora Browning Stewart, if said trust shall not have terminated prior to the date when such payment may be made, but if said trust shall have terminated prior to the date when such payment may be made then unto Dora Browning Stewart, if living, but if said Dora Browning Stewart shall not then be living then unto her then living issue, per stirpes and not per capita, or in default of any such issue then unto such person or persons as shall then be determined to be the distributees of Dora Browning Stewart under the intestacy laws of the State of Delaware in effect at the time of her death.

E:- As soon as conveniently may be to pay over the sum of Ten Thousand Dollars (\$10,000.00) unto Louisville Trust Company of Louisville, Kentucky, Trustee under agreement with William H. Donner dated September 28, 1934, for the benefit of Mary Washington Stewart, if said trust shall not have terminated prior to the date when such payment may be made, but if said trust shall have terminated prior to the date when such payment may be made, then unto Mary Washington Stewart, if living, but [fol. 30] if said Mary Washington Stewart shall not then be living then unto her then living issue, per stirpes and not per capita, or in default of any such issue then unto such person or persons as shall then be determined to be the distributees of Mary Washington Stewart under the intestacy laws of the State of Delaware in effect at the time of her death.

F:- As soon as conveniently may be to pay over the sum of Ten Thousand Dollars (\$10,000.00) unto Louisville Trust Company of Louisville, Kentucky, Trustee under agreement with William H. Donner dated September 28, 1934, for the benefit of Paula Browning Denckla, if said trust shall not have terminated prior to the date when such payment may be made, but if said trust shall have terminated prior to the date when such payment may be made then unto Paula Browning Denckla, if living, but if said Paula Browning Denckla shall not then be living, then unto her then living issue, per stirpes and not per capita, or in default of any such issue then unto such person or persons as shall then be determined to be the distributees of Paula Browning Denckla under the intestacy laws of the State of Delaware in effect at the time of her death.

G:- As soon as conveniently may be to pay over the sum of Ten Thousand Dollars (\$10,000.00) unto Louisville Trust Company of Louisville, Kentucky, Trustee under agreement with William H. Donner dated December 22, 1934, for the benefit of William Donner Denckla, if said trust shall not have terminated prior to the date when such payment may be made, but if said trust shall have terminated prior to the date when such payment may be made then unto William Donner Denckla, if living, but if said William Donner Denckla shall not then be living, then unto his then living issue, per stirpes and not per capita, or in default of any such issue then unto such person or persons as shall then be determined to be the distributees of William Donner Denckla under the in-
[fol. 31] testacy laws of the State of Delaware in effect at the time of his death.

H:- As soon as conveniently may be to pay over the sum of Ten Thousand Dollars (\$10,000.00) unto Louisville Trust Company of Louisville, Kentucky, Trustee under agreement with William H. Donner dated December 22, 1934, for the benefit of William Donner Roosevelt, if said trust shall not have terminated prior to the date when such payment may be made, but if said trust shall have terminated prior to the date when such payment may be made then unto William Donner Roosevelt, if living, but

if said William Donner Roosevelt shall not then be living, then unto his then living issue, per stirpes and not per capita, or in default of any such issue then unto such person or persons as shall then be determined to be the distributees of William Donner Roosevelt under the intestacy laws of the State of Delaware in effect at the time of his death.

I:- As soon as conveniently may be, to set aside and hold in further trust hereunder the sum of Ten Thousand Dollars (\$10,000.00) for each grandchild of Trustor that may be born after the date of this instrument but prior to the death of Trustor, as a separate trust fund, each of such separate trust funds, if any, to be held, administered and/or distributed as follows:

To apply the net income of the trust fund to the support, maintenance, benefit and/or education of such grandchild for whom such trust fund shall have been set aside in such manner and to such extent as Trustee, in its sole discretion, shall deem to be for the best interest of such grandchild until such grandchild shall have attained the age of twenty-one years, at which time, or if such grandchild shall have attained the age of twenty-one years at the time when such trust fund shall be for him or her set aside then upon the setting aside of such trust fund [fol. 32] Trustee shall assign, transfer, convey and deliver such trust fund, principal and undistributed income thereof, if any, free from this trust, unto such grandchild; Any application of such income as aforesaid may be made directly by Trustee, or by payment to the guardian of the person or such grandchild, or to the person with whom such grandchild shall reside, or directly to such grandchild, and any such application or payment shall be a full discharge to Trustee therefor.

In the event of the death of any grandchild of Trustor for whom a separate trust fund shall be set aside as hereinbefore provided prior to such grandchild receiving distribution thereof, then upon the death of such grandchild Trustee shall assign, transfer, convey and deliver such separate trust fund set aside for such grandchild of Trustor so dying unto such person or persons as shall

then be determined to be the distributees of such grandchild of Trustor so dying under the intestacy laws of the State of Delaware in effect at the time of the death of such grandchild.

J:- As soon as conveniently may be to pay over the balance of the trust fund, if any, after making all of the foregoing payments, as follows:

One-half thereof unto Wilmington Trust Company, Trustee under agreement with William H. Donner dated March 18, 1932 for the benefit of Katherine N. R. Denckla, if such trust shall not have terminated prior to the date when such payment may be made; but if such trust shall have terminated prior to the date when such payment may be made then unto Katherine N. R. Denckla, if living, but if said Katherine N. R. Denckla shall not then be living, then unto her then living issue, per stirpes and not per capita, or in default of any such issue then unto Dorothy Browning Stewart, if living, but if said Dorothy Browning Stewart shall not then be living, then unto her then living issue per stirpes and not per capita, or in [fol. 33] default of any such issue; then unto such person or persons as shall then be determined to be the distributees of Dorothy Browning Stewart under the intestacy laws of the State of Delaware in effect at the time of her death;

The remaining one-half thereof unto Wilmington Trust Company, Trustee under agreement with William H. Donner dated March 19, 1932 for the benefit of Dorothy Browning Stewart, if such trust shall not have terminated prior to the date when such payment may be made; but if such trust shall have terminated prior to the date when such payment may be made, then unto Dorothy Browning Stewart, if living, but if said Dorothy Browning Stewart shall not then be living, then unto her then living issue, per stirpes and not per capita, or in default of any such issue then unto such person or persons as shall then be determined to be the distributees of Dorothy Browning Stewart under the intestacy laws of the State of Delaware in effect at the time of her death.

I authorize and direct said Trustee to make any of the payments hereinbefore directed to be made in cash or in kind or partly in cash and partly in kind; to withhold in

whole or in part any payments directed to be made in paragraphs B to J inclusive until the expiration of six months but not later than twelve months after my death; and to make the payments hereinbefore directed to be made in the order in which they are set forth until all of the property held by it shall have been completely distributed,—none of said payments to be made unless and until all of the payments preceding it in the order in which they are set forth shall have been made in full.

I hereby reserve the right to revoke, alter, amend or modify in whole or in part the appointment herein made [fol. 34] of the property held by Wilmington Trust Company as Trustee under that certain agreement which I entered into with it on March 25, 1935.

IN WITNESS WHEREOF, I, the said DORA BROWNING DONNER, have hereunto set my hand and Seal this sixth day of April A. D. 1935.

/s/ DORA BROWNING DONNER (Seal)

WITNESS:

/s/ J. E. HANSINI

WILMINGTON TRUST COMPANY hereby acknowledges receipt of the foregoing exercise of power of appointment by Dora Browning Donner this 17th day of May A. D. 1935.

WILMINGTON TRUST COMPANY

By: /s/ TILGHMAN JOHNSTON
Vice-President

Attest: (Seal)

/s/ A. W. BIRCH
Assistant Secretary

[fol. 33] EXHIBIT 4 TO BILL FOR DECLARATORY DECREE

WHEREAS, I, the undersigned, DORA BROWNING DONNER, as Trustor, entered into a certain trust agreement with WILMINGTON TRUST COMPANY, a Delaware corporation, as Trustee, on the 25th day of March, 1935; and

WHEREAS, Paragraph 1 of said trust agreement provided among other things as follows:

"Upon the death of Trustor Trustee shall assign, transfer, convey and deliver this trust fund, principal and undistributed income thereof, if any, free from this trust, unto such person or persons and in such manner and amounts; and upon such trusts, terms and conditions as Trustor shall have appointed by the last instrument in writing which she shall have executed and delivered to Trustee, . . ."

and

WHEREAS, by instrument in writing dated the 6th day of April, 1935 I exercised the foregoing power of appointment and in said instrument of writing I reserved the right to revoke, alter, amend or modify said exercise of said power of appointment in whole or in part; and

WHEREAS, I now desire to alter, amend and modify said exercise of said power of appointment dated the 6th day of April, 1935, and do hereby alter, amend and modify the same as follows:-

1: By revoking and canceling Paragraph C appearing on page 2 thereof and reading as follows:-

"C:- As soon as conveniently may be to pay over the sum of Ten Thousand Dollars (\$10,000.00) unto John Stewart, presently residing in Radnor, Pennsylvania, his heirs, executors, administrators or assigns;"

and substituting in lieu thereof the following:-

"C:- As soon as conveniently may be to pay over the sum of Fifteen Thousand Dollars (\$15,000.00) unto John Stewart, presently residing in Radnor, Pennsylvania, his heirs, executors, administrators or assigns, and the sum of

One Thousand Dollars (\$1,000.00) unto James Smith, presently residing in Villanova, Pennsylvania, . . . his heirs, executors, administrators or assigns;"

I hereby ratify and confirm said exercise of said power of appointment dated the 6th day of April, 1935 in all other respects.

IN WITNESS WHEREOF, I, the said DORA BROWNING DONNER, have hereunto set my Hand and Seal this 11th day of October A. D. 1939.

/s/ DORA BROWNING DONNER (Seal)

WITNESS:

/s/ J. E. HANSINI

WILMINGTON TRUST COMPANY hereby acknowledges receipt of the foregoing alteration, amendment and modification of exercise of power of appointment dated April 6, 1935 by Dora Browning Donner this 11th day of October A. D. 1939.

WILMINGTON TRUST COMPANY

BY: /s/ WALTER J. LAIRD
Vice-President
(Seal)

ATTEST: /s/ A. W. BIRCH
Assistant Secretary

[fol. 37] EXHIBIT 5 TO BILL FOR DECLARATORY DECREE

DONNER* FIRST POWER OF APPOINTMENT

WHEREAS I, the undersigned, DORA BROWNING DONNER, as Trustor, entered into a certain trust agreement with WILMINGTON TRUST COMPANY, a Delaware corporation, as Trustee, on the 25th day of March, 1935 (hereinafter called the "trust agreement"); and

WHEREAS Paragraph 1 of the trust agreement provided among other things as follows:

"Upon the death of Trustor Trustee shall assign, transfer, convey and deliver this trust fund, principal and undistributed income thereof, if any, free from this trust, unto such person or persons and in such manner and amounts and upon such trusts, terms and conditions as Trustor shall have appointed by the last instrument in writing which she shall have executed and delivered to Trustee, . . .";

and

WHEREAS by instrument in writing dated the 6th day of April, 1935, I exercised the power of appointment provided as aforesaid by the trust agreement but in said instrument I reserved the right to revoke, alter, amend or modify said exercise of said power of appointment in whole or in part; and

WHEREAS by instrument in writing dated the 11th day of October, 1939, I altered, amended and modified said exercise of said power of appointment; and

Whereas I now desire to revoke all exercises by me, previous to the date hereof, of said power of appointment:

THESE PRESENTS WITNESS THAT:

1. I do hereby revoke all exercises by me, previous to the date hereof, of the power of appointment provided as [fol. 38] aforesaid by the trust agreement, including, but not so as to restrict the generality of the foregoing, the exercise effected by the said instrument in writing dated the 6th day of April, 1935, as altered, amended and modified by the said instrument in writing dated the 11th day of October, 1939.

2. Exercising the said power of appointment provided as aforesaid by the trust agreement, I do hereby direct Wilmington Trust Company, trustee under the trust agreement, upon my death, to assign, transfer, convey and deliver the principal and undistributed income of the trust fund held by it under the trust agreement as follows, namely:-

(a) As soon as conveniently may be, to pay over

(i) The sum of Two thousand dollars to MIRIAM V. MOYER, of Philadelphia, Pennsylvania;

(ii) The sum of One thousand dollars to JAMES SMITH if he shall be in the employment of a member of my family at the time of my death;

(iii) The sum of One thousand dollars to WALTER HAMILTON:

(iv) The sum of One Thousand Dollars to each of my servants, other than the said Walter Hamilton, who shall have been in my employment for more than two years at the time of my death;

(v) The sum of Ten thousand dollars to Louisville Trust Company, a corporation of the Commonwealth of Kentucky, its successors and assigns, IN TRUST, NEVERTHELESS, to hold, manage, invest and reinvest the same, to collect the income thereof and after paying out of such income all charges and expenses properly payable therefrom, including a reasonable compensation to my said Trustee, to pay the net income of this trust fund to my son-in-law Benedict H. Hanson during the remainder of his lifetime and upon the death of my said son-in-law, I direct my said Trustee to pay the principal and undistributed income, if any, of the trust unto the Delaware Trust Company, a corporation of the State of Delaware, its successors and assigns, Trustee of a certain trust dated November 26th, 1948, numbered 9023, created by my daughter Elizabeth Donner Hanson, for the benefit of my grandson, Donner Hanson, to be held administered and/or distributed by it subject to all the trusts, uses, terms and conditions set forth in said trust.

(vi) To the BRYN MAWR HOSPITAL, of Bryn Mawr, Pennsylvania, the sum of Ten thousand dollars, to be used by said hospital to endow a bed to be inscribed "In honor of Dorothy B. Rodgers Stewart, given by her mother Mrs. Dora Browning Donner";

(vii) The sum of Two hundred thousand dollars to Delaware Trust Company, a corporation of the State of Delaware, its successors and assigns, trustee of a certain trust

dated November 26, 1948, numbered 9022, created by my daughter Elizabeth Donner Hanson for the benefit of my grandson JOSEPH DONNER WINSOR, to be held, administered and/or distributed by it subject to all the trusts, uses, terms and conditions set forth in said trust numbered 9022; and the further sum of Two hundred thousand dollars to Delaware Trust Company, a corporation of the State of Delaware, its successors and assigns, trustee of a certain trust dated November 26, 1948, numbered 9023, created by my daughter Elizabeth Donner Hanson for the benefit of my grandson DONNER HANSON, to be held, administered and/or distributed by it subject to all the trusts, uses, terms and conditions set forth in said trust numbered 9023;

(b) As soon as conveniently may be, to pay the residue of the principal and undistributed income of the said trust fund held by it under the trust agreement to the Executrix of my Last Will and Testament to be dealt with by her in [fol. 40] accordance with the terms and conditions of my said Last Will and Testament and any Codicil thereto.

I authorize and direct said Wilmington Trust Company to make all the payments hereinbefore directed to be made in cash or in kind or partly in cash and partly in kind; to withhold in whole or in part any payments directed to be made until the expiration of six months but not later than twelve months after my death; and to make the payments hereinbefore directed to be made in the order in which they are set forth until all of the property held by it shall have been completely distributed, none of said payments to be made unless and until all of the payments preceding it in the order in which in this instrument they are set forth shall have been made in full.

IN WITNESS WHEREOF I, the said Dora Browning Donner, have set hereto my hand and seal this 3rd day of December, A.D. 1949.

Witness:

Dorothy A. Doyle, R.N.

Dora B. Donner

Delivery of the foregoing instrument in writing dated the 3rd day of December, A. D. 1949, executed by Dora Browning Donner, has been made to Wilmington Trust Company this 21st day of December A. D. 1949.

WILMINGTON TRUST COMPANY

By: Jos. W. Chevin, Jr.

Vice-President & Trust Officer

Attested: J. Y. JEANES, JR.

Assistant Secretary

[fol. 41] EXHIBIT 6 TO BILL FOR DECLARATORY DECREE

DONNER* SECOND POWER OF APPOINTMENT

WHEREAS I, the undersigned, DORA BROWNING DONNER, as Trustor, entered into a certain trust agreement with WILMINGTON TRUST COMPANY, a Delaware corporation, as Trustee, on the 25th day of March, 1935 (hereinafter called the "trust agreement"); and

WHEREAS Paragraph 1 of the trust agreement provided among other things as follows:

"Upon the death of Trustor Trustee shall assign, transfer, convey and deliver this trust fund, principal and undistributed income thereof, if any, free from this trust, unto such person or persons and in such manner and amounts and upon such trusts, terms and conditions as Trustor shall have appointed by the last instrument in writing which she shall have executed and delivered to Trustee, . . .";

and

WHEREAS by instrument in writing dated the 3rd day of December 1949, I exercised the power of appointment provided as aforesaid by the trust agreement after revoking all exercises by me, previous to the date thereof, of said power of appointment; and

WHEREAS I now desire to partially revoke the said instrument in writing dated the 3rd day of December 1949 by which I exercised said power of appointment.

THESE PRESENTS WITNESS THAT:

1. I do hereby partially revoke said instrument in writing dated the 3rd day of December 1949 by the deletion therefrom of subsection (V) of Section (a) of Article 2 which reads as follows:—

[fol. 42] (V) The sum of Ten thousand dollars to Louisville Trust Company, a corporation of the Commonwealth of Kentucky, its successors and assigns, IN TRUST, NEVERTHELESS, to hold, manage, invest and reinvest the same, to collect the income thereof and after paying out of such income all charges and expenses properly payable therefrom, including a reasonable compensation to my said Trustee, to pay the net income of this trust fund to my son-in-law Benedict H. Hanson during the remainder of his lifetime and upon the death of my said son-in-law, I direct my said Trustee to pay the principal and undistributed income, if any, of the trust unto the Delaware Trust Company, a corporation of the State of Delaware, its successors and assigns, Trustee of a certain trust dated November 26th, 1948, numbered 9023, created by my daughter Elizabeth Donner Hanson, for the benefit of grandson, Donner Hanson, to be held administered and/or distributed by it subject to all the trusts uses, terms and conditions set forth in said trust.

2. In all other respects, I do hereby confirm the instrument in writing dated the 3rd day of December 1949 by which I exercised the said power of appointment provided as aforesaid by the trust agreement.

IN WITNESS WHEREOF, I, the said Dora Browning Donner, have set hereto my hand and seal this 7th day of July, A. D. 1950.

Witness:

GRACE E. WALKER

DORA B. DONNER

[fol. 43] Delivery of the foregoing instrument in writing dated the 7th day of July, A. D. 1950, executed by Dora

Brown Donner, has been made to Wilmington Trust Company this 11th day of July A. D. 1950.

WILMINGTON TRUST COMPANY

By: JOSEPH RHOADS
Asst. Vice-Pres.

Attested:

W.M.W. (Illegible)
Asst. Sec.

[fol. 44] .

CLERK'S NOTE

On the 22nd day of January, 1954, Summons was issued, which, according to original Returns of Sheriff attached thereto, was served January 29th, 1954, on William Donner Roosevelt, Donner Hanson, Joseph Donner Winsor, and Elizabeth Donner Hanson, Individually and as executrix of the will of Dora Browning Donner, Deceased. Said Summons and the original Returns of the Sheriff were filed herein on February 9, 1954.

IN THE CIRCUIT COURT OF THE FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH COUNTY, FLORIDA

NOTICE OF SUIT—Filed January 22, 1954

To: Wilmington Trust Company, in its individual corporate capacity and as trustee, Wilmington, Delaware;
Louisville Trust Company, in its individual corporate capacity and as trustee, Louisville, Kentucky;
Delaware Trust Company, in its individual corporate capacity and as trustee, Wilmington, Delaware;
Bryn-Mawr Hospital, in its individual corporate capacity and as trustee, Bryn-Mawr, Pennsylvania;
The Donner Corporation, a Pennsylvania corporation, 1710 Fidelity Trust Building, Philadelphia, Pennsylvania;

Benedict H. Hanson, 510 Park Avenue, Apartment B-4,
New York, N. Y.;

John Stewart, Beachwood Road, Rosemont, Pennsylv-
ania;

Dora Browning Stewart Lewis, 7000 Glendale, Chevy
Chase, Maryland;

[fol. 45] Mary Washington Stewart Borie, 6912 Madison-
ville Road, Marimont, Cincinnati, Ohio;

Miriam V. Moyer, 1719 Fidelity Trust Building, Phila-
delphia, Pennsylvania;

James Smith, 221 Williams Road, Rosemont, Pennsylv-
ania;

Dora Donner Ide, 485 Park Avenue, New York, N. Y.;

Paula Browning Denckla, 5 East 67th Street, New York,
N. Y.;

William Donner Denckla, 5 East 67th Street, New York,
N. Y.;

You and each of you are hereby notified that a bill for
declaratory decree has been filed against you in the above
styled case and you and each of you are required to file your
answer thereto with the clerk of said court and to serve a
copy thereof upon Burns, Middleton & Rogers, or Redfearn
& Ferrell, attorneys for plaintiffs, whose addresses are
shown below, on or before the 25th day of February, 1954,
otherwise decree pro confesso will be entered against you.

Dated at West Palm Beach, Florida, January 22nd, 1954.

J. Alex Arnette, Clerk of said Circuit Court, By
Thaddie P. Plant, Deputy Clerk.

(Seal of Clerk of
Circuit Court)

C. Robert Burns, Harvey Building, West Palm Beach,
Florida

and

Redfearn & Ferrell, 550 Brickell Avenue, Miami, Florida,
Attorneys for Plaintiffs.

Publish: Palm Beach Times Jan. 23, 30; Feb. 6,
13, 1954.

[fol. 46.] IN CIRCUIT COURT OF THE FIFTEENTH JUDICIAL
CIRCUIT IN AND FOR PALM BEACH COUNTY, FLORIDA

ORDER APPOINTING GUARDIAN AD LITEM—February 16, 1954

This cause coming on to be heard on the motion of the defendant, Elizabeth Donner Hanson, for the appointment of a guardian ad litem for the minor defendants herein, Joseph Donner Winsor and Donner Hanson, and the Court being advised in the premises,

It Is Thereupon Ordered and Adjudged that said motion be and the same is hereby granted; that said Elizabeth Donner Hanson, mother and natural guardian of said minors be and she is hereby appointed guardian ad litem for the minor defendants, Joseph Donner Winsor and Donner Hanson.

It Is Further Ordered and Adjudged that said guardian ad litem shall make such defenses as she may deem proper to protect the interests of said minor defendants and that she shall serve and file such defenses on or February 18, 1954, the return date of the process served upon said minor defendants.

Done and Ordered in Chambers this 16 day of February, 1954.

C. E. Chillingworth, Circuit Judge.

[fol. 47]

CLERK'S NOTE

On the 17th day of February, 1954, Proof of Publication of Notice of Suit, showing publication in the Palm Beach Times January 23, 30, February 6, 13, 1954, was filed and duly recorded in Chancery Order Book 230 at Page 610.

IN CIRCUIT COURT OF THE FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH COUNTY, FLORIDA

MOTION OF ELIZABETH DONNER HANSON, ETC.—
Filed February 18, 1954

Come now the defendants, Elizabeth Donner Hanson, individually, as Executrix of the will of Dora Browning Donner, Deceased and as guardian ad litem for Donner Hanson and Joseph Donner Winsor, and William Donner Roosevelt, individually, by their undersigned attorneys and severally move the Court to dismiss this suit on the grounds:

1. The Court lacks jurisdiction over the subject matter in this suit for the following reasons. Defendants, Wilmington Trust Company and Delaware Trust Company, are corporations organized and operating as trust companies under the laws of the State of Delaware at Wilmington, Delaware. The Donner Corporation is a corporation organized and operating under the laws of the State of Pennsylvania at Philadelphia, Pennsylvania. None of said corporations have [fol. 48] any place of business in the State of Florida; nor are any of them transacting any business in this state; nor do any of them have any officers or agents in this state; nor have any of them been served with process in this state. There is no res in this state which would constitute a legal basis for constructive service upon any of them. The assets, which constitute the subject matter of this suit, are situated in the State of Delaware and no part thereof are or have ever been physically or constructively situated or located in this state. Long prior to the institution of this suit Wilmington Trust Company paid over and distributed to Delaware Trust Company, as Trustee, the assets of the trusts for the benefit of Joseph Donner Winsor and Donner Hanson described in the bill of complaint and paid over and distributed to Bryn-Mawr Hospital and the individual donees the cash given to them by the decedent, alleged in said bill of complaint. All of the assets of said trusts for the benefit of Joseph Donner Winsor and Donner Hanson are in the possession, custody and control of Delaware Trust Company in Wilmington, Delaware. Elizabeth Donner Hanson, as Executrix of the decedent's Estate, does not have and has

never had any possession, custody or control of any portion of aforesaid trust assets or cash gifts. These defendants are informed and believe that the defendants hereto sought to be served by constructive process will not submit themselves to the jurisdiction of this Court by appearing herein. The exercise by this Court of the jurisdiction sought to be invoked by the plaintiffs herein would contravene the Constitution and Laws of the State of Florida and the Constitution of the United States, and, in particular, Section 1 of the Fourteenth Amendment to the United States Constitution.

[fol. 49] 2. The Court lacks jurisdiction over the person of indispensable parties, for the foregoing reasons..

3. The purported process herein directed to indispensable parties is insufficient, for the foregoing reasons.

4. The purported service of process upon indispensable parties is insufficient, for the foregoing reasons.

5. The plaintiffs have failed to join indispensable parties by valid and legal process, for the foregoing reasons.

Wideman, Caldwell, Pacetti & Robinson, Manley P.
Caldwell, Madison F. Pacetti, Attorneys for aforesaid defendants.

William H. Foulk, Of Counsel, for aforesaid defendants.

Duly sworn to by Elizabeth Donner Hanson, jurat omitted in printing.

[fol. 50] IN CIRCUIT COURT OF THE FIFTEENTH JUDICIAL
CIRCUIT IN AND FOR PALM BEACH COUNTY, FLORIDA

DECREE PRO CONFESSO—March 4, 1954

The Plaintiff, having filed a Praecipe directing the Clerk to enter a Decree Pro Confesso against the defendant,

It Is Therefore Ordered that said bill be and is hereby taken as confessed by the defendant as follows:

Wilmington Trust Co., a Delaware Corporation; Louisville Trust Co., a Kentucky corporation; Delaware Trust Co., a Delaware corporation; Bryn-Mawr Hospital, a Pennsylvania corporation; The Donner Corporation, a Pennsylvania corporation; Benedict H. Hanson; John Stewart; Dora Browning Stewart Lewis; Mary Washington Stewart Borie; Miriam V. Moyer; James Smith and Dora Donner Ide.

Done and Ordered at the Clerk's office, City of West Palm Beach, Florida, this 4th day of March, 1954.

J. Alex Arnette, Clerk Circuit Court, By Thaddie P. Plant, Deputy Clerk.

[fol. 51] IN CIRCUIT COURT OF THE FIFTEENTH JUDICIAL
CIRCUIT IN AND FOR PALM BEACH COUNTY, FLORIDA

ORDER APPOINTING GUARDIAN AD LITEM—March 8, 1954

This cause coming on this day to be heard before me on plaintiffs' motion for the appointment of a guardian ad litem for the minor defendants, Paula Browning Denckla and William Donner Denckla, and it appearing to the Court that due service of process by publication has been made on said minor defendants as required by law, and said minor defendants having failed to answer or otherwise respond as required by law on or before the return day specified in the notice to appear, to-wit: February 25, 1954; and the Court being otherwise fully advised in the premises, it is thereupon,

Ordered, Adjudged and Decreed that Wilbur C. Cook, Esq., an attorney practicing before the Bar of this Court, be and he is hereby appointed as guardian ad litem for Paula Browning Denckla and William Donner Denckla, minor defendants in this cause, and the said guardian ad litem is hereby required to file an answer or make such defense as he may deem necessary or proper to protect the substantial interests, if any, of the said minor defendants.

Done and Ordered at West Palm Beach, Florida, this 8 day of March, 1954.

C. E. Chillingworth, Circuit Judge.

[fol. 52] IN CIRCUIT COURT OF THE FIFTEENTH JUDICIAL CIRCUIT IN AND FOR PALM BEACH COUNTY, FLORIDA

ORDER—April 9, 1954

This cause was duly presented by counsel for the parties.

Though this suit is primarily concerned with the validity and effect of certain powers of appointment, rather than the Will, I am inclined to think that the matters sought to be presented by the motion filed February 18, 1954 can best be determined at final hearing.

Thereupon, It Is Ordered that ruling upon the motion of, Elizabeth Donner Hanson, etc., filed February 18, 1954, be postponed until trial and final hearing, with leave to said defendants to further plead within 15 days from date.

Copy furnished counsel.

Done and Ordered, this April 9, A. D. 1954.

C. E. Chillingworth, Circuit Judge.

[fol. 53] IN THE FIFTEENTH JUDICIAL CIRCUIT COURT
IN AND FOR PALM BEACH COUNTY, FLORIDA
IN CHANCERY, No. 31,980

[Title omitted]

OFFICIAL COURT REPORTER'S TRANSCRIPT OF PROCEEDINGS
BEFORE THE COURT—April 6, 1954

[fol. 54] APPEARANCES:

Messrs. Burns, Middleton & Rogers, Harvey Building, West Palm Beach, Florida, and Messrs. Redfearn & Ferrell, 550 Brickell Avenue, Miami, Florida, Attorneys for Plaintiffs, by Hon. C. Robert Burns, Hon. John M. Farrell, and Hon. D. H. Redfearn.

Messrs. Wideman, Caldwell, Pacetti & Robinson, Harvey Building, West Palm Beach, Florida, and Hon. William H. Foulk, Wilmington, Delaware, attorneys for Defendants Elizabeth Donner Hanson, individually as Executrix of the will of Dora Browning Donner, deceased, and as Guardian ad Litem for Donner Hanson and Joseph Donner Winsor; and William Donner Roosevelt, individually, by Hon. Manley P. Caldwell, Hon. Madison F. Pacetti, and Hon. William Foulk.

Hon. Wilbur E. Cook, Harvey Building, West Palm Beach, Florida, Guardian ad Litem for defendants Paula Browning Denckla, and William Donner Denckla.

Be It Remembered, that the following proceedings were had in the above numbered and entitled cause, on its merits, before Honorable C. E. Chillingworth, one of the Judges of the above styled Court, in Chambers, in the County Court House, in the City of West Palm Beach, in said State and County, on Tuesday, the sixth day of April, A. D. 1954, at the hour of 10:00 o'clock a. m.

There were present, at said time and place, among others, the attorneys above enumerated.

Thereupon, the following proceedings were had, to wit:

The Court: All right.

Mr. Caldwell: It is our motion which is called up for argument, so—

Mr. Redfearn: Before the argument begins, I think there should be an announcement of representation here. Mr. C. Robert Burns and D. H. Redfearn represent the plaintiffs. I would like to have an announcement as to who represents the defendants.

Mr. Caldwell: Defendants are represented by our firm, Wideman, Caldwell, Pacetti & Robinson, by myself, Manley [fol. 56] P. Caldwell and Madison F. Pacetti, and William H. Foulk of Wilmington, Delaware. And, I believe, Wilbur Cook is Guardian ad Litem for certain defendants.

The Court: Do you represent all the defendants, or some of them?

Mr. Caldwell: We represent some of them. We represent the defendant Hanson as Executrix and as Guardian ad Litem for two children, Donner Hanson and Joseph Donner

Winsor, and also William Roosevelt. Those, I might say, are the only defendants in our group that have entered any appearance or any pleadings in the case.

The Court: All right.

Mr. Redfearn: We would like for the record also to show whether or not Mr. Foulk, whom Your Honor is recognizing as a member of the Florida Bar for this particular case, is a director in the Delaware Trust Company, and whether or not he is a member of the Trust Committee of that institution, and whether or not he is general counsel for it, or is associate counsel.

Mr. Foulk: I am a director, and I am a member of the Trust Committee. I am not general counsel, and I do not represent the bank.

Mr. Redfearn: You do not represent the bank?

Mr. Foulk: No. Berl, Potter & Anderson are general [fol. 57] counsel for the bank.

Mr. Redfearn: But you are a director of the Delaware Trust Company?

Mr. Foulk: That's right.

Mr. Redfearn: And you are a member of the Trust Committee?

Mr. Foulk: That's right.

Mr. Caldwell: Is there anything further, Mr. Redfearn?

Mr. Redfearn: The question with reference to Mr. Foulk's right to represent the defendants in this case arises as a result of his announcement. Mr. Foulk is a director of the Delaware Trust Company and he is a member of the Trust Committee. The Delaware Trust Company is Trustee for the two grandchildren named by Mr. Caldwell. It is also Trustee for our clients. There is a conflicting interest there. The Delaware Trust Company cannot have its director and Trust Committee member here representing one group of beneficiaries when it is its duty to stand impartially between the litigants and to tell this Court that it will take the trust funds received and administer them for the benefit of whatever beneficiary appears to be entitled to the same as a result of the order of this Court.

Now, for its member of the Board of Directors and its [fol. 58] member of the Trust Committee to come here to take sides in the case on behalf of one group of beneficiaries against another is contrary to the canons of ethics of the

Florida State Bar, and when Mr. Foulks asked for the privilege of practicing law in Florida in this particular case he automatically becomes subject to our canons of ethics, which require, under Rule 1, that an attorney represent his client with undivided loyalty. Mr. Foulks cannot represent his client, Delaware Trust Company, or these beneficiaries, with undivided loyalty when it is a contest between two sets of beneficiaries with the Delaware Trust Company trustee for both.

Whoever wins this case, the Delaware Trust Company will take over for that set of beneficiaries. Mr. Foulk can't get on his legal horse and ride off in two directions in this case and expect this Court to hear him.

Mr. Caldwell: Do you want to reply to that?

Mr. Foulks: If Your Honor has any question about it—I am not here representing the Delaware Trust Company. I am here representing the executrix, and I have so appeared in the proceedings before the County Judge. I hadn't considered that I was creating any conflict, because [fol. 59] the Delaware Trust Company has not appeared in this case, and I have no authority to appear for them or to act for them in this proceedings, but if Your Honor has any—

The Court: I am not sufficiently familiar with this case to pass upon that. I will recognize you as *amicus curiae* and will be glad to have your views, or anybody else's interested in the case.

Mr. Redfearn: He made another admission that needs to be noted in the record. He says he represents the executrix. The executrix is a trustee, and it is the duty of the executrix to stand impartially between these two sets of beneficiaries. Now, he is representing the executrix, who has to represent these beneficiaries impartially. He says he is not counsel for the Delaware Trust Company, and they have not been served, according to him, in this case, but he is a member of their Board of Directors and their Trust Committee, and he is here trying to make one set of beneficiaries prevail over another in this case, and we wish the record to show that.

Mr. Caldwell: It is the duty of the executrix to do what she considers best for upholding the intentions of the testa-

tor and fulfilling her trust. If she considers that the intentions of the testator are——

[fol. 60] The Court: I will be glad to hear Mr. Caldwell on the motion. I don't know enough about this to pass upon the propriety of the situation. What motions do you have? Let's get down to business.

Mr. Burns: It is their motion, if Your Honor please.

The Court: All right.

Mr. Caldwell: If you are through with the preliminaries——

The Court: You needn't take this. This is just argument.

Mr. Caldwell: I don't think this has to be reported.

Mr. Redfearn: We would like to have the statements in the record as to representation.

The Court: Yes, but the argument doesn't need to be reported.

(Reporter excused.)

[fol. 61] Reporter's certificate to foregoing transcript omitted in printing.

[fol. 62] IN SUPREME COURT OF STATE OF FLORIDA

ORDER DENYING PETITION FOR WRIT OF CERTIORARI—
Filed July 1, 1954

This cause having heretofore been submitted to the Court on Petition for Writ of Certiorari upon the transcript of record and briefs to review the order of the Circuit Court for Palm Beach County in said cause bearing date April 9th, 1954, and the record having been inspected, it is ordered that said Petition be and the same is hereby denied.

A True Copy

Test:

Guyte P. McCord, Clerk Supreme Court

(Seal of Supreme Court of
the State of Florida)

[fol. 63] IN CIRCUIT COURT OF THE FIFTEENTH JUDICIAL
CIRCUIT IN AND FOR PALM BEACH COUNTY, FLORIDA

ANSWER OF ELIZABETH DONNER HANSON, ETC., ET AL.—

Filed August 3, 1954

Come now the defendants, Elizabeth Donner Hanson, individually, as Executrix of the will of Dora Browning Donner, Deceased and as guardian ad litem for Donner Hanson and Joseph Donner Winsor, and William Donner Roosevelt, individually, by their undersigned attorneys, and for their joint and several answer to the bill of complaint herein allege:

1.

These defendants admit the allegations of Paragraph 1 of the bill of complaint concerning the corporate status of Wilmington Trust Company, Louisville Trust Company, Delaware Trust Company, Bryn-Mawr Hospital and The Donner Corporation. They admit that said corporations are not qualified to do business in the State of Florida and that none of the officers, directors, general managers, cashiers, resident agents and business agents of said corporations can be found within the State of Florida.

These defendants admit the allegations of the first paragraph of the bill of complaint concerning the residences and ages of the non-corporate defendants herein, except they deny that the defendant, Walter Hamilton, is a resident of Palm Beach County, Florida, his residence being Rosemont, Pennsylvania.

2.

Answering Paragraph 2 of the bill, these defendants admit that Dora Browning Donner was a resident of Pennsylvania on March 25, 1935 and that she was a resident of Florida subsequent to January 15, 1944, until her death on November 20, 1952. They admit the allegations in said [fol. 64] paragraph concerning her last will and testament and the payment of intangible property taxes.

3.

These defendants admit the allegations of Paragraph 3 of the bill of complaint.

4.

These defendants admit the allegations of Paragraph 4 of the bill, but aver that the facts therein alleged are not material because the exercise of the power of appointment therein described was superseded and revoked by a subsequent exercise of said power of appointment.

5.

These defendants admit the allegations of Paragraph 5 of the bill, but aver that the facts therein alleged are not material because the exercise of the power of appointment therein described was superseded and revoked by a subsequent exercise of said power of appointment.

6.

These defendants admit the allegations of Paragraph 6 of the bill.

7.

These defendants admit the allegations of Paragraph 7 of the bill.

8.

Answering Paragraph 8 of the bill, these defendants deny that any decree which should be entered in this suit would bind the defendants, Elizabeth Donner Hanson as Executrix of said Estate, or individually, or Dora Donner Ide or The Donner Corporation, because this Court lacks jurisdiction of the subject matter of this suit and of indispensable parties hereto for the reasons hereinafter alleged in Paragraph 10 of this answer.

Further answering Paragraph 8 of the bill, these defendants admit that in the exercise of the power of appointment dated April 6, 1935, the Trustor provided \$10,000 for each grandchild of the Trustor born after April 6, 1935. They deny that all grandchildren born to said Trustor after

said date have been made parties defendant to this cause and assert that Trustor's grandson, Curtin Winsor, Jr., was born after said date. However, these defendants allege this omission is immaterial because said exercise of power of appointment was superseded and revoked by a subsequent exercise of such power of appointment.

Answering the last sub-paragraph of Paragraph 8 of the will, these defendants admit the allegations therein as to the provisions for servants of the Trustor, but allege that Ruth Brenner, Dorothy Doyle and Mary Gläckens were qualified to receive and did receive, and have been paid, \$1,000.00 each in accordance with said provisions of said exercise of power of appointment.

9.

Although these defendants are advised that the allegations of Paragraph 9 of the bill are so argumentative and replete with conclusions of law as not to require answer, in order that their position may be clear to the Court, Paragraph 9 is answered as follows:

These defendants allege that the only questions and doubts that have arisen concerning the property passing under the residuary clause of said will are those raised by the plaintiffs in this suit. Since the Decedent during her [fol. 56] lifetime did effectively and validly exercise powers of appointment under the Trust Agreement described in the bill, only the portion of the property in such Trust, which was not disposed of by said exercise of powers of appointment, passed under the residuary clause of said will. The rest of the property in said Trust passed to and has been delivered to the recipients under the appointment dated December 3, 1949, as amended July 7, 1950, to-wit, to Delaware Trust Company as Trustee for the benefit of Joseph Donner Winsor, and as Trustee for the benefit of Donner Hanson and to the individual recipients named in said appointment. Said trusts were not created by Dora Browning Donner, but were created prior to December 3, 1949, by Elizabeth Donner Hanson.

These defendants deny that any of the exercises of powers described in the bill is testamentary in character

and deny that each provides that it is not to take effect until after the death of said settlor. Since none of the said exercises are testamentary in character, none of these is required to be executed in the manner required by the applicable law for testamentary disposition.

These defendants further allege that even if any of said exercises was testamentary in character or form, each of them was executed in the manner required by the applicable law for testamentary dispositions. Each of said exercises was signed by the Decedent in the presence of two attesting witnesses present at the same time. In addition to the subscribing witness on each exercise, there was on the occasion of each execution at least one additional individual present at the same time the instrument was signed by the Decedent, as a second attesting witness thereto.

These defendants further allege that even if the exercise [fol: 67] dated December 3, 1949, as amended July 7, 1950, is testamentary in character and lacks proper testamentary execution, the same was ratified and confirmed by and through the last will and testament of the Decedent, which was executed in proper testamentary form.

These defendants further aver that the only questions which have been raised as to which is the proper law to be applied with reference to said exercises of powers of appointment, have been raised by the plaintiffs in this suit. It is clear that the law that controls as to such exercises is the law of the State of Delaware, where the Trusts have their situs, where the Trustees have their places of business and where the assets of said Trusts were and are located, while the law which controls as to whether the execution of said exercises was in proper testamentary form, if such was required, is the law of the State of Florida, of which Decedent was a resident at the time of her death.

These defendants deny that there are any assets of the residuary estate of the Decedent which must be "captured" for the benefit of the Estate prior to the discharge of the Defendant Executrix, or at any time. Said Defendant Executrix conceives that it is her duty to uphold the obvious and unambiguously expressed intent of the Decedent that provision be made for her grandchildren and the other persons named in the exercise of December 3, 1949, as

amended on July 7, 1950, and that the plaintiffs herein should receive only the remainder of the trust property. Therefore, it is admitted that she takes the position that the exercise of December 3, 1949, as amended, is valid and fully effective, and she has proceeded accordingly in the administration of said Estate.

Wherefore These Defendants Pray that the exercise of [fol: 68] December 3, 1949, as amended on July 7, 1950, be declared and decreed to be valid and effective, and that it be declared that only such portion of the trust property which was not disposed of by said exercise, as amended, passed into the residuary estate of the Decedent and thence to the plaintiffs, and that the plaintiffs are not entitled to any other portion of said trust property.

10.

Further answering said bill of complaint and for defences on jurisdictional grounds, these defendants aver that this Court lacks jurisdiction over the subject matter in this suit for the following reasons.

Defendants, Wilmington Trust Company and Delaware Trust Company, are corporations organized and operating as trust companies under the laws of the State of Delaware at Wilmington, Delaware. The Donner Corporation is a corporation organized and operating under the laws of the State of Pennsylvania at Philadelphia, Pennsylvania. None of said corporations have any place of business in the State of Florida; nor are any of them transacting any business in this State; nor do any of them have any officers or agents in this State; nor have any of them been served with process in this State.

There is no res in this state which would constitute a legal basis for constructive service upon any of them. The assets, which constitute the subject matter of this suit, are situated in the State of Delaware and no part thereof are or have ever been physically or constructively situated or located in this State.

Long prior to the institution of this suit Wilmington Trust Company paid over and distributed to Delaware [fol: 69] Trust Company, as Trustee, the assets of the

trusts for the benefit of Joseph Donner Winsor and Donner Hanson described in the bill of complaint and paid over and distributed to Bryn-Mawr Hospital and the individual donees the cash given to them by the Decedent, alleged in said bill of complaint. All of the assets of said trusts for the benefit of Joseph Donner Winsor and Donner Hanson are in the possession, custody and control of Delaware Trust Company in Wilmington, Delaware. Elizabeth Donner Hanson, as Executrix of the Decedent's Estate, does not have and has never had any possession, custody or control of any portion of aforesaid trust assets or cash gifts.

Said defendants, Wilmington Trust Company and Delaware Trust Company, have declined to appear herein or to submit themselves to the jurisdiction of this Court in any manner.

This Court cannot enter a decree which would be valid and enforceable as to the assets of said Trust, or which would be entitled to full faith and credit under the Constitution of the United States. The exercise by this Court of the jurisdiction sought to be invoked by the plaintiffs herein would contravene the Constitution and Laws of the State of Florida and the Constitution of the United States and in particular, Section 1 of the Fourteenth Amendment to the United States Constitution.

The Court lacks jurisdiction over the person of aforesaid indispensable parties, for the foregoing reasons.

The purported process herein directed to said indispensable parties is insufficient, for the foregoing reasons.

The purported service of process upon said indispensable parties is insufficient, for the foregoing reasons.

The plaintiffs have failed to join said indispensable parties by valid and legal process, for the foregoing reasons.

[fol. 70] Wherefore, These Defendants Pray that this suit be dismissed for lack of jurisdiction of this Court.

11.

Further answering said bill of complaint, these defendants aver that Elizabeth Donner Hanson, as Executrix and Trustee under the last will and testament of Dora Brown-

ing Donner, Deceased, intending to meet plaintiffs' charge that she has failed to take steps to "capture" assets belonging to said Estate, and in order to expedite the final determination of the controversy raised by plaintiffs, on the 28th day of July, 1954, filed in the Court of Chancery of the State of Delaware in and for New Castle County, a complaint for declaratory judgment against Wilmington Trust Company as Trustee, Delaware Trust Company as Trustee, the plaintiffs in this suit and others, as defendants, asking the Court to determine the persons entitled to participate in the assets held in trust by Wilmington Trust Company under aforesaid trust agreement, and seeking other appropriate relief. Copy of said complaint is hereto attached and made a part of this answer.

Said Court of Chancery of the State of Delaware in and for New Castle County, the county in which Wilmington Trust Company and Delaware Trust Company are situated, is the only Court (1) having jurisdiction of aforesaid trust, the Trustees and the trust assets; (2) which can appropriately and finally determine the validity of said exercise of powers of appointment and (3) whose decree would be entitled to full faith and credit under the Constitution of the United States.

Continuance of the suit in this Florida Court would be oppressive, invalid, ineffective and unnecessary in view of the pendency of said Delaware suit, in which the plaintiffs [fol. 71] herein, and the other interested parties, can obtain appropriate and final determination and adjudication of their rights by a valid and enforceable judgment.

Wherefore, These Defendants Pray that this Florida suit be stayed pending determination of said Delaware suit, and that this suit be dismissed upon the final determination of such Delaware suit.

Wideman, Caldwell, Pacetti & Robinson, Manley P.
Caldwell, Madison F. Pacetti, Attorneys for aforesaid Defendants.

William H. Foulk, Of Counsel for aforesaid Defendants.

CERTIFICATE OF SERVICE (omitted in printing).

[fol. 72]

ATTACHMENT TO ANSWER

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

ELIZABETH DONNER HANSON, as Executrix and Trustee
under the last will of Dora Browning Donner, deceased,
Plaintiff,

v.

WILMINGTON TRUST COMPANY, a Delaware corporation, as
Trustee under three separate agreements (1) and (2)
with William H. Donner dated March 18, 1932 and
March 19, 1932, and (3) with Dora Browning Donner
dated March 25, 1935;

DELAWARE TRUST COMPANY, a Delaware corporation, as
Trustee under three separate agreements, (1) with Wil-
liam H. Donner dated August 6, 1940, and (2) and (3)
with Elizabeth Donner Hanson, both dated November 26,
1948;

KATHERINE N. R. DENCKLA;

ELWYN L. MIDDLETON, Guardian of the property of Dorothy
B. R. Stewart, a mentally ill person;

JOSEPH DONNER WINSOR; DONNER HANSON;

BRYN MAWR HOSPITAL, a Pennsylvania corporation; MIRIAM
V. MOYER; JAMES SMITH; WALTER HAMILTON; DOROTHY
A. DOYLE; RUTH BRENNER; MARY GLACKENS;

LOUISVILLE TRUST COMPANY a Kentucky corporation, as
Trustee for Benedict H. Hanson, and as Trustee Under
agreements with William H. Donner;

DORA STEWART LEWIS; MARY WASHINGTON STEWART BORIE;
PAULA BROWNING DENCKLA; WILLIAM DONNER DENCKLA;
WILLIAM DONNER ROOSEVELT; CURTIN WINSOR, JR.; JOHN
STEWART; and BENEDICT H. HANSON;

Defendants.

COMPLAINT FOR DECLARATORY JUDGMENT

[fol. 73] 1. Elizabeth Donner Hanson, the plaintiff, is Executrix of and Trustee under the will, dated December 3, 1949, of her mother, Dora Browning Donner, who died November 20, 1952 (a copy of said will is attached hereto, marked Exhibit A and made a part hereof). She was appointed Executrix by the County Judges' Court in and for Palm Beach County, Florida, on December 23, 1952, and duly qualified thereafter.

2. Wilmington Trust Company is a Delaware corporation engaged in banking, with principal offices at Tenth and Market Streets, Wilmington, Delaware. It is Trustee under three separate agreements: (1) and (2) with William H. Donner dated March 18, 1932 and March 19, 1932, and (3) with Dora Browning Donner dated March 25, 1935, designated Trust #2152 (a copy of said agreement is attached hereto, marked Exhibit B and made a part hereof).

3. Delaware Trust Company is a Delaware corporation engaged in banking, with principal offices at 900 Market Street, Wilmington, Delaware. It is Trustee under three separate agreements: (1) with William H. Donner dated August 6, 1940 for the benefit of Katherine N. R. Denckla, designated Trust #8555; and (2) and (3) with Elizabeth Donner Hanson each dated November 26, 1948, for the benefit of Joseph Donner Winsor and Donner Hanson, designated Trusts #9022 and #9023 respectively.

4. Katherine N. H. Denckla (sometimes known as Katherine N. R. Denckla Ordway), beneficiary under Trust designated #8555, resides at Hobe Sound, Florida.

5. Elwyn L. Middleton, residing at Harvey Building, West Palm Beach, Florida, was duly appointed guardian for Dorothy B. R. Stewart, a mentally ill person, by the County Judges' Court in and for Palm Beach County, [fol. 74] Florida, on December 22, 1952. Dorothy B. R. Stewart is the beneficiary for life of a testamentary trust created by Paragraph Fifth, (b) of the will of the said Dora Browning Donner; the plaintiff is designated as Trustee thereof to pay income to Dorothy B. R. Stewart as directed by Katherine N. R. Denckla.

6. Joseph Donner Winsor and Donner Hanson, beneficiaries under Trusts designated #9022 and #9023, respectively, as hereinbefore set forth in Paragraph 3, are minors, residing with their mother, Elizabeth Donner Hanson, at 2540 South Ocean Boulevard, Palm Beach, Florida.

7. The following defendants, all of whom are non-residents of the State of Delaware, were appointed under a power of appointment dated October 3, 1949 (a copy of which is attached hereto, marked Exhibit C and made a part hereof), exercised by Dora Browning Donner under trust dated March 25, 1935, designated Trust #2152, and, with the exception of Louisville Trust Company, Trustee for Benedict H. Hanson, which appointment was later revoked by appointment dated July 7, 1950 (a copy of which is attached hereto, marked Exhibit D and made a part hereof), have received the amounts appointed to them:

Bryn Mawr Hospital		
Bryn Mawr, Pa.		\$10,000.
Miriam V. Moyer		2,000.
1710 Fidelity-Philadelphia Bldg.		
Philadelphia, Pa.		
James Smith		1,000.
221 Williams St.		
Rosemont, Pa.		
Walter Hamilton		1,000.
Rosemont, Pa.		
[fol. 75] Dorothy A. Doyle)		1,000.
5108 Penn St.)		
Philadelphia 24, Pa.)		
) Servants in em-	
Ruth Brenner)	ployment for more	1,000.
4224 Osage Avenue)	than two years at	
Philadelphia 4, Pa.)	time of Dora	
) Browning Donner's	
Mary Glackens)	death.	1,000.
4930 Westminster Ave.)		
Philadelphia 31, Pa.)		

Louisville Trust Company
 Louisville, Ky.
 Trustee for Benedict H.
 Hanson, 510 Park Ave.,
 New York City, New York.

10,000.

8. The following defendants, all of whom are non-residents of the State of Delaware, were appointed under two powers of appointment dated April 6, 1935 (a copy of which is attached hereto, marked Exhibit E and made a part hereof), and October 11, 1939 (a copy of which is attached hereto, marked Exhibit F and made a part hereof), exercised by Dora Browning Donner under trust dated March 25, 1935, designated Trust #2152; all of said appointments were revoked by the terms of the said power of appointment dated December 3, 1949 (Exhibit C hereto), but the parties are joined so as to permit adjudication of any right which they may have under said trust:

(a) Louisville Trust Company, Louisville, Kentucky, Trustee under certain agreements with William H. Donner, by a power of appointment dated April 6, 1935, for the following persons in the amount of \$10,000 each:

[fol. 76] Dora Stewart Lewis (Dora Browning Stewart)
 7000 Glendale Ave.
 Chevy Chase, Maryland

Mary Washington Stewart Borie (Mary Washington Stewart)
 6912 Madisonville Rd.
 Maremont, Cincinnati, Ohio

Paula Browning Denckla
 Grubbs Mill Road
 Berwyn, Pa.

William Donner Denckla
 5 East 67th Street
 New York, N. Y.

William Donner Roosevelt
 2540 South Ocean Blvd.
 Palm Beach, Florida

(b) Wilmington Trust Company, Wilmington, Delaware, in further trust under Trust #2152 by a power of appointment dated April 6, 1935, for afterborn grandchildren, who are as follows, in the amount of \$10,000 each:

Curtin Winsor, Jr.
2540 South Ocean Blvd.
Palm Beach, Florida

Joseph Donner Winsor
2540 South Ocean Blvd.
Palm Beach, Florida

Donner Hanson
2540 South Ocean Blvd.
Palm Beach, Florida

[fol. 77] (c) Wilmington Trust Company, Wilmington, Delaware, Trustee under certain agreements with William H. Donner dated March 18, 1932, and March 19, 1932, for the benefit of Katherine N. R. Denckla and Dorothy B. R. Stewart, respectively, by a power of appointment dated April 6, 1935, each to receive one-half of the residue of said trust.

(d) John Stewart, of Beechwood Road, Rosemont, Pa., beneficiary in the amount of \$10,000 by a power of appointment dated April 6, 1935, and increased to \$15,000 by a power of appointment dated October 11, 1939.

9. Dora Browning Donner, while residing at Villanova, Pennsylvania, entered into the said trust agreement dated March 25, 1935, designated Trust #2152, with Wilmington Trust Company (Exhibit B hereto) whereby she provided as follows:

"Trustee shall pay over the net income of the trust fund unto Trustor, for and during the term of her natural life. Upon the death of Trustor trustee shall assign, transfer, convey and deliver this trust fund, principal and undistributed income thereof, if any, free from this trust, unto such person or persons and in such manner and amounts and upon such trusts, terms and conditions as Trustor shall have appointed by the

last instrument in writing which she shall have executed and delivered to Trustee, or failing such instrument, by her last Will and Testament, or in default of any such appointment then unto the then living issue of Trustor, per stirpes and not per capita."

This trust was accepted by Wilmington Trust Company at its principal offices in Wilmington, Delaware, at which place the principal securities listed in Schedule A of the agreement were delivered to it. Said Trustee has continued to administer the trust in accordance with the terms thereof since the date of its creation and has retained possession of the corpus of said trust in Delaware except as hereinafter set forth in Paragraph 15.

[fol. 78] 10. After the creation of said trust, Dora Browning Donner exercised her reserved power of appointment under date of April 6, 1935, by appointing \$5,000 to Bryn Mawr Hospital, \$10,000 to John Stewart, \$10,000 to each of her grandchildren, who are the persons hereinbefore set forth in Paragraphs 8 (a) and (b), and the balance to Wilmington Trust Company, in trust, one-half for the benefit of Katherine N. R. Denckla (named in the will of the said Dora Browning Donner as Katherine N. R. Denckla Ordway) and the other half for the benefit of the defendant, Dorothy B. R. Stewart, as hereinbefore set forth in Paragraph 8 (c).

11. Dora Browning Donner amended said appointment of April 6, 1935, by a further appointment dated October 11, 1939, which increased the amount appointed to John Stewart from \$10,000 to \$15,000, as hereinbefore set forth in Paragraph 8 (d), and appointed \$1,000 to James Smith.

12. By the terms of a power of appointment dated December 3, 1949 (Exhibit C hereto), Dora Browning Donner revoked all appointments made by her previous to that date, especially the appointment dated April 6, 1935, as altered, amended and modified by the appointment dated October 11, 1939, and appointed \$2,000 to Miriam V. Moyer; \$1,000 each to James Smith, Walter Hamilton, Dorothy A. Doyle, Ruth Brenner, and Mary Glackens; \$10,000 to Louisville Trust Company in trust for Benedict H. Hanson for life

with remainder to Delaware Trust Company, Trustee under Trust #9023 for the benefit of Donner Hanson; \$10,000 to Bryn Mawr Hospital; and \$200,000 each to Delaware Trust Company as Trustee of Trusts #9022 for the benefit of Joseph Donner Winsor and #9023 for Donner Hanson, respectively; and the residue to the Executrix of her will, to be dealt with in accordance with the terms and conditions thereof.

[fol. 79] 13. The will of Dora Browning Donner dated December 3, 1949 (Paragraph Fifth of Exhibit A hereto) directs that her residuary estate be divided into two equal parts to be held as follows:

(a) One part to Delaware Trust Company, Trustee under an agreement with William H. Donner dated August 6, 1940 for the benefit of Katherine N. R. Denckla, designated Trust #8555.

(b) One part to the plaintiff, Elizabeth Donner Hanson, in trust, for the payment of so much of the income and/or principal therefrom for the support and maintenance, benefit and/or comfort of Dorothy B. R. Stewart (whose guardian, Elwyn L. Middleton, is a defendant herein), in such amounts and at such times and in such manner as Katherine N. R. Denckla Ordway, defendant herein, shall direct; upon the death of the said Dorothy B. R. Stewart the remainder is to be paid over to Delaware Trust Company, Trustee under an agreement with William H. Donner dated August 6, 1940 for the benefit of the said Katherine N. R. Denckla, designated Trust #8555.

14. By the terms of an appointment dated July 7, 1950 (Exhibit D hereto), Dora Browning Donner revoked and eliminated the appointment of December 3, 1949, of \$10,000 to Louisville Trust Company as Trustee for the benefit of Benedict H. Hanson.

15. Subsequent to the death of Dora Browning Donner, Wilmington Trust Company, Trustee of said Trust #2152, pursuant to the provisions thereof and in accordance with [fol. 80] the terms of Paragraph (b) of the appointment

dated December 3, 1949, "to make all the payments * * * directed to be made in cash or in kind or partly in cash and partly in kind; to withhold in whole or in part any payments directed to be made until the expiration of six months but not later than twelve months after * * * death," on January 7, 1953, paid to the individual appointees and to Bryn Mawr Hospital the amounts appointed to them, aggregating \$17,000, and on April 17, 1953, delivered to Delaware Trust Company, Trustee under Trusts #9022 and #9023, securities and cash in the aggregate amount of \$400,000. Wilmington Trust Company continues to hold the remaining assets in said trust for the account of the plaintiff as Executrix and Trustee of the will of Dora Browning Donner.

16. On January 22, 1954, Katherine N. R. Denckla and Elwyn L. Middleton, as guardian of the property of Dorothy B. R. Stewart, without having theretofore served any notice or made any demand on the plaintiff or Wilmington Trust Company as Trustee, filed suit against the plaintiff and the other defendants herein in the Circuit Court of the Fifteenth Judicial Circuit in and for Palm Beach County, Florida, being No. 31,980 in Chancery, asking for a declaratory decree determining the validity of the powers of appointment made by the said Dora Browning Donner under the provisions of her Trust dated March 25, 1935.

17. No valid service of process has been made upon either Wilmington Trust Company or Delaware Trust Company as Trustees in said suit, and said Trustees have not appeared therein. No part of the assets held by Wilmington Trust Company, as Trustee of Trust #2152, and transferred to the appointees under the power of appointment dated December 5, 1949, including those now held by Delaware Trust Company, as Trustee of Trusts #9022 and [fol. 81] #9023, are now or have ever been in the State of Florida or under the jurisdiction of the Circuit Court of the Fifteenth Judicial Circuit in and for Palm Beach County, Florida.

18. The plaintiff, being a resident of and having been served in the State of Florida, moved the court to dismiss the suit because indispensable parties were absent the juris-

diction and the court could not, therefore, render an effective and binding final decree. The Circuit Court reserved decision on this motion pending a trial on the merits, and the Supreme Court of Florida denied certiorari.

19. The complaint in the Florida suit charged that the present plaintiff as Executrix of the Estate of Dora Browning Donner, "has failed to take any steps" to capture for the estate the property of the trust appointed as, hereinbefore recited. In the argument on the motion to dismiss, the complainants in that suit represented to the court that the plaintiff herein is a "wealthy" person, and could be surcharged by the Florida court for her failure to recover the assets from the Wilmington Company, in the first instance, and presently from Delaware Trust Company, after which she could recover from said Trustees. The plaintiff desires to have the controversy hereinbefore set forth promptly and finally and conclusively determined as to all parties so that she may effectively perform all of her duties, account as Executrix and enter upon her duties as Trustee.

20. The plaintiff has no adequate remedy at law.

Wherefore, the plaintiff prays that:

(1) An appropriate summons be directed to the said defendants; and in the case of non-residents an appropriate Order for Substituted Service be entered requiring the appearance of the said defendants.

(2) This Court determine by declaratory judgment the [fol. 82] persons entitled to participate in the assets held in trust by the Wilmington Trust Company under Trust #2152 and the powers of appointment exercised pursuant thereto, at the date of death of Dora Browning Donner, and enter decrees awarding said funds to the persons entitled thereto.

(3) This Court grant such other and further relief as may be appropriate and necessary to effectuate its said judgment.

William H. Foulk, William Duffy, Jr., Attorneys for Plaintiff, 228 Delaware Trust Building, Wilmington, Delaware.

[fol. 83] IN CIRCUIT COURT OF THE FIFTEENTH JUDICIAL
CIRCUIT IN AND FOR PALM BEACH COUNTY, FLORIDA

MOTION TO STAY—Filed August 3, 1954

Come now the defendants, Elizabeth Donner Hanson, individually, as Executrix of the will of Dora Browning Donner, Deceased and as guardian ad litem for Donner Hanson and Joseph Donner Winsor, and William Donner Roosevelt, individually, by their undersigned attorneys, and move the above styled Court to stay proceedings in this suit upon the following ground:

Elizabeth Donner Hanson, as Executrix and Trustee under the last will and testament of Dora Browning Donner, Deceased, intending to meet plaintiffs' charge herein that she has failed to take steps to "capture" assets belonging to said Estate, and in order to expedite the final determination of the controversy raised by plaintiffs, on the 28th day of July, 1954, filed in the Court of Chancery of the State of Delaware in and for New Castle County, a complaint for declaratory judgment against Wilmington Trust Company as Trustee, Delaware Trust Company as Trustee, the plaintiffs in this suit and others, as defendants, asking the Court to determine the persons entitled to participate in the assets held in trust by Wilmington Trust Company under aforesaid trust agreement, and seeking other appropriate relief. Copy of said complaint is attached to the answer of these defendants filed contemporaneously with this motion and is made a part of this motion by reference. [fol. 84]. Said Court of Chancery of the State of Delaware in and for New Castle County, the county in which Wilmington Trust Company and Delaware Trust Company are situated, is the only Court (1) having jurisdiction of aforesaid Trust, the Trustees and the Trust assets; (2) which can appropriately and fully determine the validity of said exercises of powers of appointment and (3) whose decree would be entitled to full faith and credit under the Constitution of the United States; all of which more fully appears from Paragraph 10 of aforesaid answer of these defendants, which is made a part hereto by reference.

Continuance of the suit in this Florida Court would be oppressive, invalid, ineffective and unnecessary in view of the pendency of said Delaware suit, in which the plaintiffs herein, and the other interested parties, can obtain appropriate and final determination and adjudication of their rights by a valid and enforceable judgment.

Wherefore, These Defendants Move the Court that the proceedings herein be stayed pending determination of said Delaware suit.

Wideman, Caldwell, Pacetti & Robinson, Manley P.
Caldwell, Madison F. Pacetti, Attorneys for aforesaid Defendants.

William H. Foulk, Of Counsel for aforesaid Defendants.

[fol. 85] IN CIRCUIT COURT OF THE FIFTEENTH JUDICIAL
CIRCUIT IN AND FOR PALM BEACH COUNTY, FLORIDA

APPLICATION FOR INJUNCTION AND OTHER RELIEF—
Filed August 16, 1954

The plaintiffs herein respectfully show unto the Court as follows:

1.

A complaint for declaratory decree in this cause was filed on January 22, 1954, by the plaintiffs, each of whom is a citizen and resident of the State of Florida, seeking to determine what property passes to whom under the residuary clause of the will of Dora Browning Donner, deceased. The decedent was a resident of Palm Beach County, Florida, at the date of her death. Her will is presently under probate in Palm Beach County, Florida, and is being administered by a Florida citizen as executrix, to-wit: the defendant, Elizabeth Donner Hanson, who resides and has her home in Palm Beach County, Florida.

2.

The said defendant Elizabeth Donner Hanson, individually and as executrix of the last will and testament of Dora

Browning Donner, deceased, and as guardian ad litem for Donner Hanson, Joseph Donner Winsor and William Donner Roosevelt, other defendants herein, filed a motion to dismiss the complaint for declaratory decree on February 18, 1954, alleging therein that Wilmington Trust Company and Delaware Trust Company, as trustees, also defendants in such suit for declaratory decree, would not submit themselves to the jurisdiction of this Court, and that there is "no res in this state which would constitute a legal basis for constructive service upon any of them."

3.

The Honorable C. E. Chillingworth, one of the Judges of this Court, heard argument upon the aforesaid motion, and, on April 9, 1954, denied it; thereupon, the aforesaid Elizabeth Donner Hanson filed petition for certiorari in the Supreme Court of Florida seeking to have the order of Judge Chillingworth reviewed. The Supreme Court of Florida promptly denied such petition and the aforesaid defendants' petition for rehearing was also denied, and the mandate of the Supreme Court of Florida was filed in the office of the Clerk of this Circuit Court, on the 1st day of July, 1954.

4.

Thus, the issue as to jurisdiction raised by the defendant, Elizabeth Donner Hanson, has been adjudicated herein and is now the law of this case binding on all parties hereto. Decrees pro confesso herein have been duly and regularly entered against all defendants in this case except Elizabeth Donner Hanson, individually and as executrix, and except as against her children, the defendants Donner Hanson, Joseph Donner Winsor and William Donner Roosevelt, all of whom filed a joint answer in this case on August 3, 1954. Included among those defendants herein as against whom decrees pro confesso have been duly and regularly entered are the defendants Wilmington Trust Company and Delaware Trust Company, as trustees.

5.

Despite the foregoing adjudication of the Honorable Judge Chillingworth, the defendant Elizabeth Donner Hanson [fol. 87] son, in her several capacities, in said answer, which she filed herein on the 3rd day of August, 1954, again raises the identical question of jurisdiction previously unsuccessfully raised, and the said answering defendants have also set up in such answer, as well as in a motion to stay filed herein on the 3rd day of August, 1954, the fact that said Elizabeth Donner Hanson did, on the 28th day of July, 1954 (being a date subsequent to the filing in this case of the mandate of the Supreme Court of Florida above referred to), cause to be filed a complaint for declaratory judgment wherein the said Elizabeth Donner Hanson, as executrix aforesaid and as trustee, was plaintiff, in the Court of Chancery of the State of Delaware in and for New Castle County, in which said complaint for declaratory judgment the defendants named include the plaintiffs in this Palm Beach County declaratory decree action as well as the remaining defendants in the latter action. A copy of such complaint for declaratory judgment in Delaware is attached to the aforesaid answer and is made a part hereof by reference. In such complaint the aforesaid Elizabeth Donner Hanson seeks to have the Delaware Court determine substantially the identical relief prayed for in this bill for declaratory decree now pending in the Circuit Court of Palm Beach County, Florida.

6.

Plaintiffs allege that steps have been taken in the Delaware complaint for declaratory judgment suit to perfect constructive service upon these plaintiffs and that the same is returnable on or before the 10th day of September, 1954. Plaintiffs allege that the filing by the defendant Elizabeth Donner Hanson of the aforesaid complaint for declaratory judgment in Delaware is a deliberate attempt to confuse the [fol. 88] issues in this litigation and to preclude this Honorable Court in Palm Beach County, Florida, from concluding properly the case now pending before it. As evidence of bad faith on the part of the aforesaid Elizabeth

Donner Hanson in filing such suit in Delaware, plaintiffs would respectfully show that if she can lose her case in Delaware and thus indirectly defeat this complaint for declaratory decree in Palm Beach County, Florida, approximately \$417,000.00 in assets of the decedent will go to children of the aforesaid Elizabeth Donner Hanson rather than for the benefit of these plaintiffs as provided in the residuary clause of the will of the decedent. Plaintiffs further show that the said Elizabeth Donner Hanson is using as one of her attorneys in complaint for declaratory judgment in Delaware, one William H. Foulk, an attorney of Wilmington, Delaware, who is a director of Delaware Trust Company and one of its trust Committeemen. Plaintiffs allege that said Elizabeth Donner Hanson, as such plaintiff, is cooperating and collaborating with the Delaware Trust Company, one of the defendants, against the interest of plaintiffs in this case whom she represents, as such executrix, in a fiduciary capacity.

7.

Plaintiffs allege that the assets of the decedent, Dora Browning Donner, which are affected by any decision rendered in this declaratory decree suit in Palm Beach County, Florida, aggregate some \$417,000.00 in intangible property; that despite allegations by the aforesaid Elizabeth Donner Hanson, contained in her answer as executrix herein, to the effect that such assets were paid over long prior to the institution of this suit by Wilmington Trust Company, as trustee, to Delaware Trust Company, as [fol. 89] trustees, and allegations that the same are not now or ever have been in the possession, custody or control of the said Elizabeth Donner Hanson, as executrix, the facts are, and the records of the probate court of Palm Beach County, Florida, show, that the said Elizabeth Donner Hanson, as executrix, listed such identical assets in her inventory and appraisal of the assets of the estate of Dora Browning Donner, deceased. Such records affirmatively also show that on December 23, 1953, the aforesaid Elizabeth Donner Hanson, as executrix, obtained an order from the County Judge of Palm Beach County, Florida,

allowing fees to her and to her attorneys, including the aforesaid William H. Foulk, based on the entire estate of the decedent, including the \$417,000.00 worth of assets in question. Such fees were paid in December, 1953, prior to the institution of this bill for declaratory decree on January 22, 1954. After such bill had been filed and after these plaintiffs had petitioned the County Judge of Palm Beach County, Florida, to compel the aforesaid Elizabeth Donner Hanson, as executrix, to produce the assets of such estate, including those aforesaid, the said Elizabeth Donner Hanson, as executrix, filed a motion on February 26, 1954, in the County Judge's Court in Palm Beach County, Florida, offering to return approximately \$7,600.00 in executrix's fees she had collected on the aforesaid \$417,000.00 of assets, and her attorneys likewise offered to return to the estate approximately \$5,700.00 of fees they had collected on the same assets under the order of December 23, 1953, above mentioned. The County Judge of Palm Beach County, Florida, on April 9, 1954, entered an order staying further hearing on such matters until the outcome of this case in Palm Beach County, Florida. Thus the executrix has contended in the County Judge's Court in Palm Beach County, Florida, that these assets are [fol. 90] part of the estate in Palm Beach County, Florida, and she and her attorneys have collected fees on the same, while now, in this litigation, by her answer aforesaid, she contends that these assets are not subject to the jurisdiction of the Florida Courts.

8.

Plaintiffs respectfully show, therefore, based upon the above facts, it affirmatively appears that the institution of the aforesaid litigation in New Castle County, Delaware, by the said Elizabeth Donner Hanson, as executrix, is a deliberate and contumacious act on the part of said person, and that to permit her, a resident and citizen of Palm Beach County, Florida, and the personal representative of the estate of a Palm Beach County resident which estate is now in probate in Palm Beach County, Florida, to continue the prosecution of such suit in Delaware under all the circumstances here present would, as to these plaintiffs, each of

whom also is a resident of Florida, be highly inequitable, unfair, and unjust; that the continuation of such suit in Delaware would interfere with the orderly, judicial processes of this Court, and would cause great vexation, hardship, and expense to these plaintiffs.

Wherefore, plaintiffs pray:

1. That this Court will enter an injunctive order immediately restraining and enjoining the said Elizabeth Donner Hanson, individually and as executrix and trustee under the last will and testament of Dora Browning Donner, deceased, from further proceeding and maintaining such complaint for declaratory judgment in New Castle County, Delaware.

2. That the plaintiffs have such other and further relief as to this Court may seem meet and proper.

C. Robert Burns, Redfearn & Ferrell, By: C. Robert Burns, Attorneys for Plaintiffs.

[fol. 91] *Duly sworn to by Elwyn L. Middleton, jurat omitted in printing.*

IN CIRCUIT COURT OF THE FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH COUNTY, FLORIDA

REPLY TO APPLICATION FOR INJUNCTION—
Filed August 20, 1954

Come now the defendants, Elizabeth Donner Hanson, individually, as Executrix of the Last Will and Testament of Dora Browning Donner, Deceased and as guardian ad litem for defendants Joseph Donner Winsor and Donner Hanson, and William Donner Roosevelt, individually, by their undersigned attorneys, and for reply to the application for injunction heretofore filed herein by the plaintiffs, state:

[fol. 92] 1.

These defendants admit the allegations of Paragraph 1 of the application, except they aver that the purpose of

the complaint for declaratory decree filed by the plaintiffs is to determine the validity and effect of the exercise of certain powers of appointment by the decedent during her lifetime.

2.

These defendants admit the allegations of Paragraph 2 of the application.

3.

These defendants emphatically deny that the motion to dismiss on jurisdictional grounds filed by them on February 18, 1954, has ever been denied by this Court. They aver that in the order of this Court dated April 9, 1954 upon said motion, the Court held that this suit is primarily concerned with the validity and effect of certain powers of appointment rather than the will but that he was inclined to think that the matters sought to be presented by said motion can best be determined at final hearing. The Court then ordered that the ruling upon said motion be postponed until trial and final hearing. These defendants admit that they filed petition for certiorari in the Supreme Court of Florida, seeking to have said order reviewed, that the Supreme Court denied the petition and that petition for rehearing was also denied, but aver that said Supreme Court determination was not based upon the grounds of said jurisdictional question but merely sustained the postpone-ment order. These defendants deny that mandate of the Supreme Court was filed in this Court on July 1, 1954, and deny that any mandate has ever been filed herein, although a certified copy of the order of the Supreme Court denying said petition has been filed herein.

[fol. 93]

4.

These defendants deny that the issue as to jurisdiction raised by these defendants has been adjudicated herein and deny that there is any law of the case on such jurisdictional point and deny that there has been any determination binding on all parties hereto.

These defendants admit the allegations of Paragraph 4 relating to the entry of decrees pro confesso and the filing

of answer herein, but deny that said decrees pro confesso were legally entered.

5.

These defendants admit that in their answer filed herein on August 3, 1954, they raised the same jurisdictional question raised in said motion to dismiss, but deny that they at any time unsuccessfully raised such point. They admit the allegations of Paragraph 5 as to the filing of complaint for declaratory judgment in the Court of Chancery of New Castle County, Delaware.

6.

These defendants admit that steps have been taken in the Delaware suit to perfect constructive service returnable September 10, 1954. They deny that the filing of said Delaware complaint is a deliberate attempt to confuse the issues in this litigation and to preclude this Court from concluding properly the case now pending before it. They deny that Elizabeth Donner Hanson is cooperating and collaborating with the Delaware Trust Company for any purpose. They aver that the reasons for the filing of said Delaware suit by Elizabeth Donner Hanson are the ones alleged and set forth in Paragraph 11 of her answer herein and in Paragraph 19 of the complaint in the Delaware suit, which paragraphs are made a part of this reply by reference.

[fol. 94]

7.

Answering Paragraph 7 of the application, these defendants aver that while the assets in issue herein were included in the original inventory and appraisement filed by Elizabeth Donner Hanson as Executrix, and the allowance of certain fees were based thereon, such inclusion was due to misunderstanding of the attorneys for said Executrix. The Executrix has sought to file in the County Judge's Court, Palm Beach County, amended inventory and appraisement correcting this mistake, but the filing thereof has been delayed by the opposition of the plaintiffs herein. Attached hereto and made a part hereof are certified copies of petition for permission to file such amended appraise-

ment and inventory with accompanying exhibits, and order of said County Judge's Court staying proceedings upon the motion of the plaintiffs herein to dismiss said petition, until the further order of said Court. The reasons for the erroneous inclusion of said disputed assets in the original inventory and appraisal appear from allegations of said petition and the exhibits attached thereto.

Accordingly, these defendants deny that the Executrix has contended in the County Judge's Court that said assets are a part of the Estate in this County.

8.

These defendants deny that the institution of the Delaware litigation is a deliberate and contumacious act on the part of Elizabeth Donner Hanson and deny that the continuance of the prosecution of such suit in Delaware would be inequitable, unfair or unjust. They deny that the continuance of such suit in Delaware would interfere with the orderly, judicial processes of this Court and they deny that it would cause vexation, hardship or unnecessary expense to the plaintiffs, but they aver that the Delaware [fol. 95] Court is the only proper Court for the determination of the involved issues for the reasons set forth in Paragraphs 10 and 11 of the answer of these defendants, which paragraphs are made a part hereof by reference.

Wherefore, these defendants pray that said application be denied and dismissed.

Wideman, Caldwell, Pacetti & Robinson, Manley P. Caldwell; Attorneys for aforesaid Defendants.

William H. Foulk, Of Counsel for aforesaid Defendants.

Duly sworn to by Manley P. Caldwell, jurat omitted in printing.

ATTACHMENT TO REPLY, ETC.

IN THE COUNTY JUDGE'S COURT IN AND FOR
PALM BEACH COUNTY, FLORIDA

No. 10,394

IN RE:

ESTATE OF DORA BROWNING DONNER, Deceased.

PETITION

Comes now Elizabeth Donner Hanson, as Executrix of the above styled Estate, by her undersigned attorneys, and shows unto the Court as follows:

1. The Appraisement and Inventory filed herein on or about June 26, 1953 is inaccurate. It contains items which should not have been included therein and omits items which should have been included therein. The reasons for these incorrect inclusions and omissions appear from affidavits of William H. Foulk and Manley P. Caldwell, attorneys for said Executrix, which are hereto attached and made a part hereof.

2. Upon the discovery of these errors by these counsel on or about February 1, 1954, an Amended Appraisement and Inventory was prepared, which correctly sets forth the assets of this Estate, and it has been executed by the appraisers, Blaine Webb and Robert W. Hill, and by this Executrix. Copy thereof is hereto attached and made a part hereof. Petitioner desires to file herein said instrument upon obtaining permission of this Court so to do.

3. On December 23, 1953 this Court entered an order fixing and determining the fees of this Executrix and her attorneys for ordinary services and for extraordinary services to said date, in this Estate. That order was based upon the amount of the Estate stated in the original Appraisement and Inventory, and it appears from said Amended Appraisement and Inventory that the value of

the Estate is \$382,845.11 less than the amount upon which such fees were based. An Amended order fixing the fees

[fol. 97]

WILL

B 80 Page 73

of the Executrix and her attorneys should be entered, reducing said fees in accordance with the correct value of the Estate. Petitioner and her attorneys are ready, willing and able to refund to the Estate such excess of the fees paid to them, upon the entry of said amended order.

Wherefore, Petitioner prays that permission be granted for the filing of such Amended Appraisement and Inventory in the place and stead of the original Appraisement and Inventory, and that amended order fixing the fees of the Executrix and her attorneys be entered, based upon the value of the Estate shown by the Amended Appraisement and Inventory.

Wideman, Caldwell, Pacetti & Robinson, Manley P. Caldwell, Madison F. Pacetti, 501 Harvey Building, West Palm Beach, Florida, Attorneys for aforesaid Executrix.

Wm. H. Foulk, 228 Delaware Trust Building, Wilmington, Delaware, Of counsel for aforesaid Executrix.

[fol. 98]

WILL

B 80 Page 74

AFFIDAVIT OF WILLIAM H. FOULK TO PETITION

STATE OF DELAWARE,
NEW CASTLE COUNTY, ss.:

William H. Foulk, being duly sworn according to law, deposes and says that he is an attorney at law with offices at 228 Delaware Trust Building, Wilmington, Delaware, and has been engaged in general practice for upwards of thirty years; that a substantial portion of his practice is in the field of trust, estate and tax matters, and that for more than five years he has been a member of the trust committee of Delaware Trust Company, Wilmington, Delaware; that in the foregoing capacities he has represented

and been consulted with respect to trusts and estates in Delaware and its contiguous States, Pennsylvania, New Jersey and Maryland, for many years; that he has represented members of the family of William H. Donner for over twenty years and caused the incorporation of and has represented The Donner Corporation, investment adviser to the trusts created by or for members of the Donner family since its incorporation; that he represents and has advised Elizabeth Donner Hanson in all matters arising out of her appointment and qualification as Executrix of the Last Will and Testament of her mother, Dora Browning Donner, who died on November 20, 1952; that immediately after Mrs. Donner's death at the request of E. Harris Drew, Esq., the then guardian of the property of Dorothy B. Stewart, one of Mrs. Donner's daughters, he summarized the nature and extent of said estate as set forth in copy of letter sent to Mr. Drew dated November 28, 1952 (copy of which is attached hereto marked Exhibit A)¹; that immediately after the qualification of the said Elizabeth

[fol. 99]

WILL

B 80 Page 75

Donner Hanson as Executrix of her mother's estate on December 23, 1952, deponent began the accumulation of the data necessary to complete the inventory and appraisal of the estate; that in the collection of said data and in accordance with his experience in Delaware and elsewhere, he was particularly interested in the tax incidences of the estate and the need to have all taxable property appraised for estate tax purposes; that in pursuance of his duties, he requested and received from Wilmington Trust Company, Wilmington, Delaware, Trustee of a revocable trust created by Mrs. Donner under date of March 25, 1935, designated as Trust No. 2152, a list of the securities in said trust as of the date of her death (copy of which is attached hereto marked Exhibit B), and delivered said list to the appraisers for valuation as of said date, together with other data; that deponent did not advise said appraisers with reference to the disposition of

¹ The same information was given to Katherine N. R. Denckla by letter dated November 27, 1952.

ultimate ownership of said property, and upon receiving their valuation included it with their valuation of other assets directly owned in the inventory and appraisement filed in the probate proceedings; that pursuant to said trust designated Trust No. 2152, the Trustee was authorized to make distribution in cash or in kind, and pursuant to said authority and the direction contained in a power of appointment executed and filed with it dated December 3, 1949, as amended July 7, 1950, the Trustee on or about April 17, 1953, delivered to Delaware Trust Company, Wilmington, Delaware, Trustee for two trusts created by Elizabeth Donner Hanson under date of November 26, 1948, for the benefit of her two sons, Joseph Donner Winsor, and Donner Hanson, designated as Trusts Nos. 9022 and 9023, respectively, the following securities and cash, each trust receiving one-half thereof:

[fol. 100]

800 shs.	Mountain States Power Co. Common	\$10,800.00
660 shs.	Citizens' Utilities Co. Common	8,827.50
2000 shs.	New York, Chicago & St. L. Common	85,250.00
100 shs.	St. Joseph Lead Co. Common	3,956.25
2400 shs.	Savannah Electric & Power Co. Com.	102,000.00
1440 shs.	Deep Rock Oil Corporation, Common	66,060.00
100 shs.	Western N. Y. Water Co. 5% N.C. Pfd.	10,000.00
400 shs.	West Penn Electric Co., Common	14,100.00
200 shs.	Blockson Chemical Co., Common	5,025.00
800 shs.	Air Associates, Inc.	6,600.00
132 shs.	Cuno Engineering Co., Common	5,280.00
96 shs.	Cuno Engineering Co., Class A	6,720.00
2400 shs.	Connecticut Filter Corp., Common	2,400.00
200 shs.	Colorado Interstate Gas Co., Com.	6,050.00
144 shs.	Hillsboro Plantation Inc., Pref.	14,400.00
200 shs.	Hillsboro Plantation Inc., Common	8,400.00
6M Note	Hillsboro Plantation Inc.	6,000.00
28M Note	Hillsboro Plantation Inc.	28,000.00
10M Debenture	Hillsboro Plantation Inc.	10,000.00
Cash		131.24

that Delaware Trust Company, as such Trustee, has continued to hold and administer said securities and cash pursuant to the provisions of said trust; that Wilmington

Trust Company, Trustee as aforesaid, likewise pursuant to said power of appointment, as amended, on January 7, 1953, paid the following pecuniary gifts:

Miriam W. Moyer	\$ 2,000.00
James Smith	1,000.00
Walter Hamilton	1,000.00
Dorothy Doyle	1,000.00
[fol. 101]	
Ruth Brenner	1,000.00
Mary Glackens	1,000.00
Bryn Mawr Hospital	10,000.00

that the inventory and appraisement filed herein, being premised on the tax requirements of the estate, did not segregate the assets held in the revocable trust designated as Trust No. 2152, as deponent is now advised and believes is required by the laws of the State of Florida; that said inventory and appraisement failed to include the cash in said Trust No. 2152, since it was not shown on Exhibit B hereto, and likewise failed to include other items, i.e. \$5000 United States Government Bonds, which were located after the filing; that in the summer of 1953, deponent asked his associate, Manley P. Caldwell, Esq., to secure an estimate and later an order covering the fees of the Executrix and her counsel so that they would be available for computing the deductions for estate tax purposes, and although he commented by letter on the fact that said estimated allowances appeared excessive, he failed to realize that the inventory and appraisement was overstated by the amount of \$417,000.00 until he prepared the Estate Tax Return (Form 706) in January of 1954; that immediately thereafter deponent prepared and submitted an amended inventory and appraisement.

William H. Foulk

Sworn to and subscribed before me this 5th day of March, A. D. 1954.

Rose H. O'Neal, Notary Public, (N. P. Seal)

[fol. 102]

EXHIBIT A TO AFFIDAVIT

Law Offices
WILLIAM H. FOULK
228 Delaware Trust Building
Wilmington 1, Delaware

November 28, 1952

Hon. E. Harris Drew
Supreme Court Building
Tallahassee, Florida

Re: Estate of Dora B. Donner

Dear Harris:

I am enclosing copy of Mrs. Donner's will.

As I informed you the other day, Mrs. Donner had three trusts. The first, created in 1920, is divided among Mr. Donner's children, namely, Betty, Dora, Bob, and the children of Joe. Trust #7000, of which Delaware Trust Company is trustee, is divided among the various trusts for all of the children at Delaware Trust Company, namely, Betty, Dora, Bob, Dorothy, Kay, and the children of Joe, each receiving one-sixth. This trust has assets of around \$1,400,000. Trust #2152, a revocable trust with Wilmington Trust Company, is to be paid over to the Executrix under the Will after the payment of the following specific legacies:

- (1) \$2000 to Miriam V. Moyer.
- (2) \$1000 to James Smith—"if he shall be in the employment of a member of my family at the time of my death".
- (3) \$1000 to Walter Hamilton.
- (4) \$1000 to each servant—"who shall have been in my employment for more than two years at the time of my death."
- (5) \$10,000 to Louisville Trust Company in trust for Ben Hanson, but an amendment dated July 11,

1950, provides that this \$10,000 shall be paid to Delaware Trust Company as Trustee for Donner Hanson under Trust #9023 created by Betty.

(6) \$10,000 to Bryn Mawr Hospital to endow "a bed to be inscribed 'In honor of Dorothy B. Rodgers Stewart, given by her mother, Mrs. Dora Browning Donner.'"

(7) \$200,000 to Delaware Trust Company to be added to the trust for Joseph Donner Winsor—No. 9022 created by Betty; and \$200,000 to Delaware Trust Company to be added to the trust for Donner Hanson—No. 9023 created by Betty.

(8) The residue of this trust is to be paid to the Executrix under her will.

I approximate that the Executrix will receive \$1,000,000 from this trust, and that cash and other personal property will probably bring the gross estate to \$1,200,000. I estimate the Federal taxes will be around \$400,000, which would result in a residuary estate of approximately \$800,000.

It was a pleasure to be with you on Wednesday, and I hope some time in the near future I will be able to accept your invitation to visit with you in Tallahassee.

Yours very truly,

Wm. H. Foulk

WHF*O

STATEMENT OF ASSETS HELD FOR ACCOUNT OF

WILMINGTON TRUST COMPANY

WILMINGTON, DELAWARE

TRUST DEPARTMENT

[fol. 104]

CLOSE OF BUSINESS

PAR VALUE	NUMBER SHARES	DESCRIPTION OF ASSETS	RATE	MATURITY OR PAR VALUE
		CALLABLE 5TH SERIES		
50000	✓	OHIO TURNPIKE REVENUE BONDS	3 1/4	601 56-92
50000	✓	SOUTH CAROLINA PUB SERV AUTH REV	2 7/8	701 53-93
20000	✓	TAMPA FLORIDA SEWER REV	2 3/4	201 55-85
25000	✓	WASH TOLL BR AUTH LONGVIEW REV	3	1201 52-77
		REAL ESTATE & MISC BONDS		
28400	✓	HILLSBORO PLANTATION INC DEB SELLS AS UNIT	5	901 1970
		PUBLIC UTILITY PFD STOCKS		
250	✓	WESTERN N Y WATER CO NON CUM PFD	5	
300	✓	STANDARD GAS & ELECTRIC CO PFD	4	
		REAL ESTATE & MISC PFD STOCKS		
380	✓	HILLSBORO PLANTATION INC PFD	5	100
248	✓	CUNG ENGIN CORP NON CUM CLASS A	4	25
		RAILROAD COMMON STOCKS		
5000	✓	N Y CHICAGO & ST LOUIS RR COM		20
		PUBLIC UTILITY COMMON STOCKS		
1910	✓	CITIZENS UTILITIES CO COMMON 33 1/3 PAR		
2200	✓	MOUNTAIN STATES POWER CO COMMON		7 25
5000	✓	SAVANNAH ELECTRIC & POWER CO COM		
500	✓	COLORADO INTERSTATE GAS CO COM		5

EXHIBIT B TO AFFIDAVIT

WILMINGTON TRUST COMPANY

WILMINGTON, DELAWARE

STATEMENT OF ASSETS HELD FOR ACCOUNT OF

WILMINGTON TRUST COMPANY TRUSTEE

TRUST DEPARTMENT

U/A WITH DORA BROWNING DONNER
DATED 3/25/35 FOR DORA BROWNING
DONNER

2152

CLOSE OF BUSINESS NOV 20 1952

[fol. 105]

82

PAR VALUE	NUMBER SHARES	DESCRIPTION OF ASSETS	RATE	MATURITY OR PAR VALUE
MUNICIPAL BONDS				
25000	✓	BAYONNE NEW JERSEY	2 1/2	101 1953
20000	✓	LUZERNE CTY PA HOUSING AUTH REV	3	1215 1955
2000	✓	MONTGOMERY ALA PUBLIC IMP REFUND	5 1/2	701 1953
5000	✓	MONTGOMERY ALA PUBLIC IMP REFUND	5 1/2	701 1954
7000	✓	MONTGOMERY ALA SANITARY SEWER	5	501 1957
18000	✓	MONTGOMERY ALA PUBLIC IMP REFUND	5 1/2	701 1958
5000	✓	ROANE COUNTY TENNESSEE SCHOOL	3 1/4	901 1956
5000	✓	ROANE COUNTY TENNESSEE SCHOOL	3 1/4	901 1953
5000	✓	ROANE COUNTY TENNESSEE SCHOOL	3 1/4	901 1954
5000	✓	ROANE COUNTY TENNESSEE SCHOOL	3 1/4	901 1955
5000	✓	ROANE COUNTY TENNESSEE SCHOOL	3 1/4	901 1958
5000	✓	ROAN COUNTY TENNESSEE SCHOOL	3 1/4	901 1959
9000	✓	E JEFFERSON WATERWORK DIST 1 LA LOUISIANA CALLABLE	3 1/2	20161-69
18000	✓	E JEFFERSON WATERWORK DIST 1 LA LOUISIANA CALLABLE	3 1/2	20161-70
11000	✓	E JEFFERSON WATERWORK DIST 1 LA LOUISIANA CALLABLE	3 1/2	20161-71
4000	✓	E JEFFERSON WATERWORK DIST 1 LA LOUISIANA CALLABLE	3 1/2	20161-72
25000	✓	EL PASO TEXAS FUNDING	4 3/4	915 1961
50000	✓	IMPERIAL IRRIGATION DIST CALIF C	3 1/4	10168-83
10000	✓	PORT HOOD RIV ORE BR REV CALL	3 1/2	1201 1975
10000	✓	OKLAHOMA TURNPIKE AUTH REV	3	80152-90
50000	✓	OKLAHOMA TURNPIKE AUTH REV CALL	3 3/4	801 1990
4000	✓	PORT NEW YORK GEN AUTH REF REV	3 1/4	815 1977

STATEMENT OF ASSETS HELD FOR ACCOUNT OF

WILMINGTON, DELAWARE

TRUST DEPARTMENT

PAR VALUE		NUMBER SHARES	DESCRIPTION OF ASSETS	CLOSE OF BUSINESS		RATE	MATURITY OR PAR VALUE
	1000	✓	WEST PENN ELECTRIC CO COMMON				
			INDUSTRIAL COMMON STOCKS				
	2000	✓	AIR ASSOCIATES INC COMMON				1
	800	✓	BLOCKSON CHEMICAL CO COMMON				7 50
	220	✓	ST JOSEPH LEAD CO COMMON				10
	3851	✓	DEEP ROCK OIL CORP COMMON				1
	6000	✓	CONNECTICUT FILTER CORP COMMON				1
			REAL ESTATE & MISC COMMON				
	450	✓	HILLSBORO PLANTATION INC COMMON				100
			SELLS AS UNIT				
	50	✓	HILLSBORO PLANTATION COMMON				100
	331	✓	CUNO ENGINEERING CORP COMMON				1
			NOTES				
	70000	✓	NOTE HILLSBORO PLANTATION INC				
			DATED 3/11/49				
	17000	✓	NOTE HILLSBORO PLANTATION INC			5	901 1970
			DATED 9/1/50				
			58556800				

AFFIDAVIT OF MANLEY P. CALDWELL TO PETITION

STATE OF FLORIDA
COUNTY OF PALM BEACH

Manley P. Caldwell, being duly sworn, deposes and says: I am a member of the Bar of Palm Beach County, Florida and have been such member for more than 28 years. I am a member of the firm of Wideman, Caldwell, Pacetti & Robinson, which is Florida counsel for the Estate of Dora Browning Donner, being administered in the County Judge's Court of Palm Beach County, Florida. We were employed as such Florida counsel by William H. Foulk of Wilmington, Delaware, General Counsel for the Estate.

When I advised Mr. Foulk of the necessity for filing an Appraisement and Inventory in this Estate, he said that in view of his familiarity with the background of the assets of the Estate, he would prepare this instrument and forward it to me for completion of execution and filing. I furnished him with a copy of a similar instrument which had been used in another Estate we had handled, to be used as a form in the preparation of the one in this Estate.

In due course Mr. Foulk forwarded to me the Appraisement and Inventory which he had prepared and which was executed by Robert W. Hill, one of the appraisers, who resided in Wilmington, Delaware. I obtained the execution of the instrument by Blaine Webb, the other appraiser, and by Elizabeth Donner Hanson, Executrix of the Estate, and thereupon filed the same on or about June 26, 1953.

While I was generally familiar with the Trust created by Mrs. Donner on March 25, 1935 and with the subsequent exercise by her of powers of appointment, I did not know the value of the assets in this Trust. When I received the Appraisement and Inventory, I assumed that there was in- [fol. 108] cluded therein only that portion of said Trust which had passed to the Executrix under the decedent's powers of appointment, and was under the impression that the portion of the Trust which had not passed to said Execu-

trix, amounting to approximately \$417,000.00, had been excluded from the assets reported in such instrument. Had I realized that these items which I thought had been excluded were in fact included, I would have immediately called to Mr. Foulk's attention the fact that under the Florida law, only the property to which the Executrix is legally entitled is includable in the Appraisement and Inventory, regardless of the tax incidences.

The fact that the Appraisement and Inventory included these non-Estate Assets did not come to my attention until on or about February 1, 1954, some time after application for and entry of order fixing fees on December 23, 1953, based upon the Appraisement and Inventory.

Manley P. Caldwell

Sworn to and subscribed before me this 18th day of March, 1954.

J. Coyle, Notary Public, State of Florida, My Commission expires: March 24, 1957.

(N. P. Seal)

[fol. 109]

ATTACHMENT TO REPLY, ETC.

IN THE COUNTY JUDGE'S COURT
PALM BEACH COUNTY, FLORIDA

No. 10,394

IN RE:

ESTATE OF DORA BROWNING DONNER, Deceased.

AMENDED

APPRAISEMENT AND INVENTORY

Blaine Webb and Robert W. Hill, heretofore appointed as appraisers in this Estate, having heretofore reported that they have appraised all of the property of the Estate of Dora

Browning Donner so far as known to them, hereby file this Amended Appraisement and Inventory, including therein additional property and information not known to them at the time of making their original report; that said property, together with the value thereof as of November 20, 1952, the date of decedent's death, is as follows:

CASH

Wilmington Trust Company, Wilmington, Delaware	\$ 109,543.66	
Fidelity-Philadelphia Trust Co., Philadelphia, Pa.	25,293.00	
Donner Agency Account Philadelphia, Pa.	13,901.38	
First National Bank in Palm Beach Palm Beach, Florida	2,750.10	\$ 151,488.14

STOCKS AND BONDS

5M U. S. Savings Bonds, Series E, dated June 1942	5,000.00	
\$250 5% Bond-Play & Players 1714 Delancey St., Philadelphia	.62.35	

[fol. 110]

1 sh. Everglades Protective Syn.	1,000.00	
1 sh. Bath & Tennis Club, B (VTC)	25.00	6,087.35

REAL ESTATE

582 South Ocean Boulevard Palm Beach, Florida	\$ 75,000.00
--	--------------

PERSONAL PROPERTY

Cadillac Sedan	\$ 3,100.00
Jewelry	25,715.00
Household Furnishings:— 582 S. Ocean Blvd. Palm Beach, Florida	\$5,704.12

Ryan & Christie Storage

Bryn Mawr, Pa. and

Belgravia Hotel,

Phila. \$8,149.60 \$13,853.72

Accrued income, Wilmington

Trust Company—

Trust #754 3,435.42

Prepaid Insurance 730.12

Deposits for Utilities

(582 S. Ocean Blvd., P.B.) 103.62

Deposit—Macy's Bank,

New York 40.82

Prepaid Rental,

Safe Deposit Box 12.00 \$46,990.70

TRUST FUND UNDER AGREEMENT

DATED MARCH 25, 1935, WITH WILMINGTON TRUST
COMPANY, TRUSTEE. (DESIGNATED TRUST NO. 2152)

Cash \$ 27,079.16

Municipal Bonds:

25M Bayonne, N. J.

2 1/2 due 1/1/53 25,000.00

20M Luzerne City Pa.

Housing Auth. Rev. 3
due 12/15/55 20,000.00

2M Montgomery, Ala. Public

Imp. Ref. 5 1/2 due 7/1/53 2,025.00

[fol. 111]

5M Montgomery, Ala. Public

Imp. Ref. 5 1/2 due 7/1/54 5,268.75

7M Montgomery, Ala. Sanitary

Sewer 5 due 5/1/57 7,787.50

18M Montgomery, Ala. Public

Imp. Ref. 5 1/2 due 7/1/58 20,970.00

5M Roane City, Tenn.

School 3 1/4 due 9/1/56 5,156.25

5M Roane City, Tenn.

School 3 1/4 due 9/1/53 5,006.25

5M Roane City, Tenn.

School 3 1/4 due 9/1/54 5,050.00

(Municipal Bonds—continued)

5M Roane City, Tenn.	
School 3 $\frac{1}{4}$ due 9/1/55	5,093.75
5M Roane City, Tenn.	
School 3 $\frac{1}{4}$ due 9/1/58	5,181.25
5M Roane City, Tenn.	
School 3 $\frac{1}{4}$ due 9/1/59	5,187.50
9M E. Jefferson Waterwork)	
Dist. 1, La. 3 $\frac{1}{2}$ due)	
2/1/61-69)	
16M E. Jefferson Waterwork)	39,200.00
Dist. 1 La. 3 $\frac{1}{2}$ due)	
2/1/61-70)	
11M E. Jefferson Waterwork)	
Dist. 1, La. 3 $\frac{1}{2}$ due)	
2/1/61-71)	
4M E. Jefferson Waterwork)	
Dist. 1, La. 3 $\frac{1}{2}$ due)	
2/1/61-72)	
25M El Paso, Texas Funding	
4 $\frac{3}{4}$ due 9/15/61	29,593.75
50M Imperial Irrigation Dist. Cal.	
3 $\frac{1}{4}$ C due 1/1/68-83	49,000.00
10M Port Hood Riv. Ore. Br. Rev.	
Call 3 $\frac{1}{2}$ due 12/1/75	9,500.00
[fol. 112]	
10M Oklahoma Turnpike Auth. Rev.	
3 due 8/1/52-90	9,000.00
50M Oklahoma Turnpike Auth. Rev.	
Call 3 $\frac{3}{4}$ due 8/1/90	49,000.00
4M Port of N. Y. Gen. Auth. Ref.	
Rev. 3 $\frac{1}{4}$ due 8/15/77	4,080.00
50M Ohio Turnpike Rev. Bonds 3 $\frac{1}{4}$	
due 6/1/56-92	51,250.00
50M S. Carolina Pub. Serv. Auth.	
Rev. 2.70 due 7/1/53-93	43,500.00
20M Tampa, Fla. Sewer Rev. 2 $\frac{3}{4}$	
due 2/1/55-85	17,725.00
25M Wash. Toll Br. Auth. Longview	
Rev. 3 due 12/1/52-77	22,562.50

Notes:

\$70,000 Hillsboro Plantation Inc.	
5% due 3/11/69	
Int. to 11/20/52	\$82,920.60
17,000 Hillsboro Plantation Inc.	
5% due 9/1/70	
Int. to 11/20/52	19,067.71
26,400 Hillsboro Plantation Inc.	
5% due 9/1/70	
Int. to 11/20/52	28,229.78

Stocks:

250 shs. Western N. Y. Water Co.	
non cum. pfd. 5% @ 93.	23,250.00
300 shs. Standard Gas & Elec. Co.	
\$4 pfd. (no par) @ 109 5/16	32,793.75
5000 shs. N. Y., Chicago & St. Louis	
RR. com. (20 par) @ 42 5/8	213,125.00
[fol. 113]	
1910 shs. Citizens Utilities Co. Com.	
(33 1/3 par) @ 13 3/8	25,546.24
2200 shs. Mountain States Power Co.	
(7.25 par) @ 13 1/2	29,700.00
600 shs. Colorado Interstate Gas Co.	
Com. (5 par) @ 30 1/4	18,150.00
1000 shs. West Penn Electric Co.	
Com. (no par) @ 35 1/4	35,250.00
2000 shs. Air Associates, Inc.	
Com. (1 par) @ 8 1/4	16,500.00
600 shs. Blockson Chemical Co.	
Com. (7.50 par) @ 25 1/8	15,075.00
220 shs. St. Joseph Lead Co. Com.	
(10 par) @ 39 9/16	8,703.75
3651 shs. Deep Rock Oil Corp. Com.	
(1 par) @ 45 7/8	167,489.63
246 shs. Cuno Engin. Corp. Non Cum.	
4% Class A (25 par) @ 70	17,220.00
331 shs. Cuno Engin. Corp. Com.	
(1 par) @ 40	13,240.00
6000 shs. Connecticut Filter Corp.	
Com. (1 par) @ 1	6,000.00

360 shs. Hillsboro Plantation Inc.	
5% Conv. Pfd. @ 100	\$36,000.00
500 shs. Hillsboro Plantation Inc.	
Com. @ 42	21,000.00
6000 shs. Savannah Electric & Power	
Co. Com. @ 42½	255,000.00
	<hr/>
	\$1,527,478.13

[fol. 114]

Reduction by gifts to donees
in Supplemental Agreement
dated December 21, 1949, as
amended July 7, 1950

417,000.00	\$1,110,478.13
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TOTAL ASSETS	-----	\$1,390,044.32
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Respectfully submitted,

ROBERT W. HILL

" BLAINE WEBB

As Appraisers as aforesaid.

February 26, 1954.

The undersigned Executrix accepts the foregoing
Amended Appraisement and adopts it as her Inventory, as
such Executrix.

ELIZABETH DONNER HANSON

Elizabeth Donner Hanson as
Executrix of the Estate of
Dora Browning Donner, Deceased.

[fol. 115]

ATTACHMENT TO REPLY ETC.

PROBATE ORDER
B 82 · Page 436IN THE COUNTY JUDGE'S COURT IN AND
FOR PALM BEACH COUNTY, FLORIDA

No. 10,394

In Re:

ESTATE OF DORA BROWNING DONNER, Deceased.

ORDER

This cause was presented upon

1. Motion of Katherine N. R. Denckla, individually and Elwyn L. Middleton, as guardian of the property of Dorothy Browning Stewart, also known as Dorothy B. Stewart and Dorothy B. Rodgers Stewart, an incompetent person, to dismiss the petition of Elizabeth Bonner Hanson for permission to file an amended appraisement and inventory; and
 2. Motion of Katherine N. R. Denckla, individually, and Elwyn L. Middleton, as guardian of the property of Dorothy Browning Stewart, also known as Dorothy B. Stewart and Dorothy B. Rodgers Stewart, an incompetent person, to strike the answer of Elizabeth Donner Hanson, as Executrix of the above styled estate, to the petition of the aforesaid movants for the production of assets; and
 3. Objections of Katherine N. R. Denckla, individually and Elwyn L. Middleton, as guardian of the property of Dorothy Browning Stewart, also known as Dorothy B. Stewart and Dorothy B. Rodgers Stewart, an incompetent person, to the First Report of the Executrix
- and the Court having heard argument of counsel;

[fol. 116] It is, thereupon, Ordered, Adjudged and Decreed that action on such matters be and the same is hereby stayed until the further order of this Court.

Done and Ordered at West Palm Beach, Florida, this 9th day of April, 1954.

Richard P. Robbins, County Judge.

(Seal County Judge, Palm Beach County, State of Florida)

IN THE COUNTY JUDGE'S COURT OF
PALM BEACH COUNTY, FLORIDA

I, the undersigned, Clerk of the County Judge's Court in and for Palm Beach County, Florida, the same being a Court of Record and having probate jurisdiction, Do Hereby Certify that the foregoing is a true and correct copy of Petition filed on March 19th, 1954, recorded in Will Book 80, Page 72; Order dated and filed for record in this Court on April 9th, 1954, recorded in Probate Order Book 82, Page 436, in the matter of the estate of

Dora Browning Donner, Deceased,

as the same appears from the records and files of the County Judge's Office of Palm Beach County, Florida.

In Testimony Whereof, I have hereunto set my hand and seal of said Court at West Palm Beach, Florida, this the 20th day of August, A. D. 1954.

Ruby M. Ball, Clerk of the County Judge's Court of
Palm Beach County, Florida.

(Seal)

[fol. 117] IN CIRCUIT COURT OF THE FIFTEENTH JUDICIAL
CIRCUIT IN AND FOR PALM BEACH COUNTY, FLORIDA

ANSWER OF WILBUR E. COOK AS GUARDIAN AD LITEM FOR
DEFENDANT WILLIAM DONNER DENCKLA—Filed
August 25, 1954

Comes now Wilbur E. Cook as guardian ad litem for the defendant, William Donner Denckla, and for an answer to the bill for declaratory decree filed herein says that he admits the facts alleged therein and thereby.

Wherefore said guardian most respectfully submits the rights, titles and interests of said minor to the tender consideration, care and protection of this Honorable Court.

Wilbur E. Cook, as guardian ad litem for defendant William Donner Denckla, 801 Harvey Building, West Palm Beach, Florida.

IN CIRCUIT COURT OF FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH COUNTY, FLORIDA

ORDER DISCHARGING WILBUR E. COOK AS GUARDIAN AD LITEM
FOR DEFENDANT PAULA BROWNING DENCKLA—
August 25, 1954

It having been suggested verbally to the Court by Wilbur E. Cook in the presence of D. H. Redfearn, C. Robert Burns and Manley P. Caldwell, Esquires, that the defendant Paula Browning Denckla became twenty-one years of age on the 12th day of April, A. D. 1954; upon consideration thereof it is

[fol. 118] Ordered, adjudged and decreed that Wilbur E. Cook shall be and he hereby is discharged herein as guardian ad litem for the defendant, Paula Browning Denckla; and it is further

Ordered, adjudged and decreed that the Court hereby reserves the right to take appropriate action concerning

the compensation of said discharged guardian for his services rendered during the time he acted as such guardian.

Copy furnished counsel.

Done and ordered in Chambers at West Palm Beach, Florida, on this 25th day of August, A. D. 1954.

Jos. S. White, Circuit Judge.

IN CIRCUIT COURT OF FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH COUNTY, FLORIDA

INJUNCTIVE ORDER AND ORDER ON MOTION TO STAY—
August 25, 1954

This cause was presented after due notice upon application for injunction and other relief filed herein by the plaintiffs under date of August 16, 1954, and upon motion to stay filed on August 3, 1954, by the defendants, Elizabeth Donner Hanson, individually and as executrix of the will of Dora Browning Donner, deceased, and as guardian ad litem for Donner Hanson and Joseph Donner Winsor, and William Donner Roosevelt, individually, and the Court having considered the sworn application and the sworn reply thereto filed by the aforesaid defendants, and having heard argument of counsel and being advised in the premises, it is, thereupon,

[fol. 119] Ordered, Adjudged and Decreed:

1. That the aforesaid motion to stay be and the same is hereby denied.

2. That the relief sought in the aforesaid application for injunction be and the same is hereby granted, and the defendant, Elizabeth Donner Hanson be and she is hereby enjoined from further prosecuting, either individually or through counsel, that certain complaint for declaratory judgment filed by her in the Court of Chancery of the State of Delaware in and for New Castle County in which the said Elizabeth Donner Hanson, as executrix and trustee under the last will of Dora Browning Donner, deceased,

is plaintiff, and Wilmington Trust Company, a Delaware corporation, as trustee, et al., are defendants, until the further order of this court.

Copy furnished counsel.

Done and Ordered, this August 25, 1954.

Jos. S. White, Circuit Judge.

IN CIRCUIT COURT OF FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH COUNTY, FLORIDA

MOTION FOR SUMMARY FINAL DECREE—Filed
November 19, 1954

Now come the plaintiffs in the above stated case and file this motion for summary final decree on the following grounds:

1. This case is at issue upon decrees pro confesso entered against all the defendants except: (a) the defendants [fol:120] Elizabeth Donner Hanson, individually and as executrix of the will of Dora Browning Donner, deceased, and as guardian ad litem for Donner Hanson and Joseph Donner Winsor; (b) the defendant William Donner Roosevelt, individually; (c) the defendant Paula Browning Denckla; and (d) the defendant William Donner Denckla, a minor, for whom a guardian ad litem has been appointed herein.

2. The excepted defendants named above have filed an answer in this case which raise only questions of law, and it is unnecessary to take any evidence in this case.

3. The pleadings in this case disclose that the plaintiffs are entitled to a summary final decree granting them the relief prayed for in their original complaint.

Wherefore, movants pray that this Honorable Court enter a summary final decree in favor of the plaintiffs in the above stated case.

C. Robert Burns, Redfearn & Ferrell, By C. Robert Burns, Attorneys for Plaintiffs.

IN CIRCUIT COURT OF FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH COUNTY, FLORIDA

ANSWER OF PAULA BROWNING DENCKLA—Filed
November 22, 1954

The defendant Paula Browning Denckla, who became of age on April 12, 1954, for her answer to the complaint herein says that she admits the facts therein alleged.

Paula Browning Denckla.

[fol. 121]

Chan. 31,980

IN THE SUPREME COURT OF FLORIDA
JUNE TERM, A. D. 1954

TUESDAY, NOVEMBER 23, 1954.

ELIZABETH DONNER HANSON, Individually, and as Executrix of Will of Dora Browning Donner Deceased and as Guardian ad litem for DONNER HANSON and JOSEPH DONNER WINSOR, and WILLIAM DONNER ROOSEVELT, Individually, Petitioners,

v.

KATHERINE N. R. DENCKLA, Individually, and ELWYN L. MIDDLETON, as Guardian of the Property of DOROTHY STEWART, also known as Dorothy B. Stewart and Dorothy B. Rodgers Stewart, an incompetent person, Respondents.

CORRECTED ORDER OF SUPREME COURT OF FLORIDA DENYING PETITION FOR WRIT OF CERTIORARI—Filed November 26, 1954

This cause having heretofore been submitted to the Court on Petition for Writ of Certiorari upon the transcript of record and briefs to review the order of the Circuit Court for Palm Beach County in said cause bearing date August 25, 1954, and the record having been inspected, it is ordered that said Petition be and the same is hereby denied.

A True Copy, Test: Guyte P. McCord, Clerk Supreme Court (Seal of Supreme Court of the State of Florida).

[fol. 122] IN CIRCUIT COURT OF THE FIFTEENTH JUDICIAL
CIRCUIT IN AND FOR PALM BEACH COUNTY, FLORIDA

MOTION OF CERTAIN DEFENDANTS FOR SUMMARY FINAL
DECREE—Filed December 3, 1954

Come now the defendants, Elizabeth Donner Hanson, Individually, as Executrix of the Will of Dora Browning Donner, Deceased, and as Guardian ad litem for Donner Hanson and Joseph Donner Winsor, and William Donner Roosevelt, Individually, by their undersigned attorneys, and move the Court to enter, pursuant to Florida Equity Rule 40, a summary final decree in these defendants' favor dismissing the action on the ground that:

1. It appears from the pleadings herein and the affidavits of C. Kenneth Baxter, Paul D. Lovett and Joseph W. Chinn, Jr., attached to this motion and made a part hereof, that this Court lacks jurisdiction herein for the reasons alleged in Paragraph 10 of these defendants' answer, and that there is no genuine issue as to any material fact on said jurisdictional point and that these defendants are entitled to a final decree of dismissal, as a matter of law.

2. These defendants further move, in the alternative, that in the event the Court denies aforesaid motion, that it enter, pursuant to said Rule, summary final decree in these defendants' favor declaring and decreeing that the exercise of power of appointment dated December 3, 1949, as amended on July 7, 1950, set forth in the pleadings, is valid and effective, and declaring and decreeing that only such portion of the property covered by the Trust identified [fol. 123] in the pleadings which was directly appointed to the Executrix by the exercise of said power, as amended, passed into the residuary Estate of the Decedent. These defendants so move on the ground that it appears from the pleadings herein and aforesaid supporting affidavits that there is no genuine issue as to any material fact and that these defendants are entitled to such summary final decree as a matter of law.

Wideman, Caldwell, Pacetti & Robinson, Manley P.
Caldwell, Madison F: Pacetti, Attorneys for
aforesaid Defendants.

Wm. H. Foulk, Wilmington, Delaware, Of Counsel for
aforesaid Defendants.

[fol. 124]

EXHIBIT A TO MOTION

AFFIDAVIT OF C. KENNETH BAXTER

COMMONWEALTH OF PENNSYLVANIA,
COUNTY OF PHILADELPHIA,

On this 30th day of November, 1954, personally appeared before me, the undersigned, a Notary Public for the State and County aforesaid, C. KENNETH BAXTER, who being by me duly sworn did depose and say:

1. From 1931 until September 1940 I was employed as an investment advisor by William H. Donner, the husband of Dora Browning Donner, and/or members of his family and/or companies owned or controlled by them. I then became secretary and treasurer of Donner Estates, Inc. (later named The Donner Corporation), an investment advisor company, and from time to time thereafter I served as secretary, treasurer, vice president, and since January 1, 1950, president of said corporation.

2. Donner Estates, Inc., was incorporated on September 11, 1940 by Dora Donner Ide to act as investment counsel to the trustees under a number of trusts created by William H. Donner and by certain members of his family. Its name was changed to The Donner Corporation on June 5, 1947. Its stock, consisting of 100 shares of par value of \$10.00 each was originally owned by Dora Donner Ide (a daughter of William H. Donner and Dora Browning Donner). On or about October 28, 1940, Dora Donner Ide transferred the shares of Donner Estates, Inc., to the Wilmington Trust Company as trustee for the benefit of the issue of William H. Donner. The "issue" were defined in the agreement to include Dorothy B. R. Stewart and

Katherine N. R. Denckla who had been adopted by William H. Donner.

3. From 1931 until the present my activities and business and personal relationship with William H. Donner and [fol. 125] members of his family were such that I became generally familiar with the provisions of the numerous trusts created by William H. Donner and members of his family, and the personnel of the family.

4. William H. Donner and his first wife, Adella May Newson, had two children, Robert N. Donner and Joseph W. Donner. They were divorced in 1907. Robert N. Donner had two children, Robert Donner, Jr., and Margaret H. Donner, Jr. Joseph W. Donner had two children, Joseph W. Donner, Jr., and Carroll E. Donner, Jr. I am advised that none of the aforementioned issue of William H. and Adella May Donner are involved in this litigation.

5. William H. Donner married his second wife, Dora Browning Rodgers, on March 27, 1909. The latter was the widow of J. Norwood Rodgers who died on January 20, 1905. Dora Browning Rodgers and J. Norwood Rodgers had two children, Katherine N. Rodgers who married Paul Denckla, and Dorothy B. Rodgers who married John Stewart, who was president of The Donner Corporation from October 1940 to December 31, 1949. Paul Denckla and Katherine N. Rodgers Denckla had two children, Paula Browning Denckla and William Donner Denckla. John Stewart and Dorothy B. Rodgers Stewart had two children, Dora Stewart who married Lawrence Lewis, Jr., and Mary Washington Stewart who married David Boyde Borie.

6. Following the marriage of William H. Donner and Dora Browning Rodgers the following children were born to them: Elizabeth Donner, Dora Donner, and William H. Donner, Jr. The latter died without issue. Elizabeth Donner married Elliott Roosevelt and had one child by him, William Donner Roosevelt. Following a divorce, Elizabeth Donner married Curtin Winsor and had two children by him, Curtin Winsor, Jr., and Joseph Donner Winsor. Following a second divorce, Elizabeth Donner married Benedict Hanson and by him had one child, Donner Hanson.

[fol. 126] Dora Donner married John Jay Ide and they have no children. William H. Donner died on November 3, 1953, and Dora Browning Donner died on November 20, 1952.

7. Dora Browning Donner entered into an agreement of trust dated March 25, 1935 with the Wilmington Trust Company as trustee. I am familiar with the terms of that agreement. The value of the assets transferred to the trustee at the time of the creation of the trust was approximately \$291,420.85. Prior to December 13, 1940 the persons acting as advisors to the trustee under paragraph 5 of the agreement were successively, William H. Donner; J. Edward Hairsine, and myself or either of us; and J. Edward Hairsine, John Stewart and myself, or any of us. On December 13, 1940 The Donner Corporation was named successor advisor and has continued in that capacity. The officers of The Donner Corporation who from time to time were authorized to act on its behalf in performing its functions as advisor to said trust were John Stewart, J. Edward Hairsine, John T. Lyons, H. R. Baxter, Edward V. Kruger, W. R. Yarnall and myself. None of these persons, with the exception of John Stewart, were related to Dora Browning Donner. Dora Browning Donner was at no time either an officer, director or stockholder of the corporation.

8. At no time did Dora Browning Donner either directly or indirectly attempt to direct, suggest or consult with the advisors under paragraph 5 of the trust agreement dated March 25, 1935 with respect to any phase of their duties as such advisors, but on the contrary, such advisors performed their duties as advisors solely in accordance with their own best independent judgments. In the performance of their duties as advisors, they instructed Wilmington Trust Company as trustee to purchase, sell or otherwise deal with the securities held in trust without [fol. 127] ever advising Dora Browning Donner with respect thereto either before or after action was taken by the Wilmington Trust Company or at any other time.

9. At the time of the appointment dated December 3, 1949 under the agreement of March 25, 1935 between Dora Browning Donner and Wilmington Trust Company as

trustee, and at all times thereafter, Katherine N. R. Denckla and Dorothy B. R. Stewart and their respective issue had substantial incomes and/or interests from and in various other trusts.

10. During 1940 and 1941, William H. Donner created trusts for the benefit of each of his then living grandchildren including then living children of his adopted daughters Katherine N. Rodgers Denckla and Dorothy B. Rodgers Stewart, namely, Paula Browning Denckla, William Donner Denckla, Dora Stewart Lewis, Mary Washington Stewart Borie, William Donner Roosevelt and Curtin Winsor, Jr. Neither Donner Hanson nor Joseph Donner Winsor had been born when said trusts were created and as a result no provision was made for them under said trusts. Subsequently, Donner Hanson and Joseph Donner Winsor acquired beneficial interests under other trusts which were relatively small in value as compared with the aforementioned 1940 and 1941 trusts. On December 3, 1949 and at all times until the death of Dora Browning Donner the value of the corpus of each of the respective trusts under which the grandchildren (other than Joseph Donner Winsor and Donner Hanson) of William H. Donner had beneficial interests exceeded by more than \$200,000 the corpus of the trusts for Joseph Donner Winsor and Donner Hanson, and when increased by the assets appointed to them by the instruments dated December 3, 1949 and July 7, 1950 exercising the power of appointment granted to Dora Browning Donner by the agreement [fol. 128] dated March 25, 1935 between her and the Wilmington Trust Company as trustee, the latter trusts are each of a substantially lesser value than the corpus of each of the trusts for each of the other grandchildren.

/s/ C. Kenneth Baxter

SWORN to and subscribed before me the day and year first above written.

/s/ Miriam V. Moyer
Notary Public,

Commonwealth of Pennsylvania

My Commission expires: Jan. 29, 1955
(N. P. Seal)

[fol. 129]

EXHIBIT B TO MOTION

AFFIDAVIT OF PAUL D. LOVETT

STATE OF DELAWARE,
COUNTY OF NEW CASTLE,

On this 30th day of November, 1954, personally appeared before me the undersigned, a Notary Public of the State and County aforesaid, PAUL D. LOVETT, who being by me duly sworn did depose and say:

1. That he is and at all times hereinafter referred to has been a vice-president of, and in charge of the Trust Department of, Delaware Trust Company.

2. That on November 26, 1948, a Trust Agreement (No. 9023) was entered into between Elizabeth Donner Hanson and Delaware Trust Company as Trustee for the benefit of Donner Hanson and others, and on the same date a Trust Agreement (No. 9022) was entered into between Delaware Trust Company as Trustee and Elizabeth Donner Hanson for the benefit of Joseph Donner Winsor and others, and that at all times since November 26, 1948 the trusts have been in full force and effect and have been administered by the Delaware Trust Company as Trustee.

3. The assets held by the Delaware Trust Company as trustee under the two trusts referred to in paragraph 2 hereof have been located exclusively within the State of Delaware at all times since the inception of such trusts.

4. The Trustee has no office or other place of business outside of the State of Delaware, transacts no business outside of the State of Delaware, and all of its duties as Trustee under the two aforementioned trusts have been performed within the State of Delaware.

/s/ Paul D. Lovett

SWORN to and subscribed before me the day and year first above written.

/s/ Rose H. O'Neal, Notary Public, State of Delaware. My commission expires: 6/15/55.

(N. P. Seal)

[fol. 130]

EXHIBIT C TO MOTION

AFFIDAVIT OF JOSEPH W. CHINN, JR.

STATE OF DELAWARE,
COUNTY OF NEW CASTLE,

On this 1st day of December, 1954, personally appeared before me, the undersigned, a Notary Public for the State and County aforesaid, JOSEPH W. CHINN, JR., who being by me duly sworn did depose and say that:

1. At all times hereinafter mentioned, I have been an officer of the Wilmington Trust Company of Wilmington, Delaware, and I am presently a vice-president and the trust officer thereof.

2. On or about March 25, 1935, the Wilmington Trust Company (hereinafter "Trustee") executed in Wilmington, Delaware, an agreement dated March 25, 1935 between itself as Trustee and Dora Browning Donner (hereinafter "Trust Agreement") which created a trust with respect to securities described in Schedule A attached to the Trust Agreement and such other securities or property as might thereafter be received by the Trustee under the Trust Agreement. Either at the time when the Trust Agreement was executed by the Trustee or prior thereto, the same had been executed by Dora Browning Donner. A copy of the Trust Agreement (with Schedule A thereto) is attached to the bill of complaint filed herein.

3. At or about the time when the Trust Agreement was executed by the Trustee, Dora Browning Donner assigned, transferred and delivered to the Trustee in Wilmington, Delaware, the securities listed on Schedule A attached to the Trust Agreement. From time to time Dora Browning Donner, acting in accordance with the terms of the Trust Agreement transferred additional sums of money and securities to the Trustee to be held by it under the Trust Agreement. The securities initially and subsequently so [fol. 131] delivered were either endorsed or the Trustee received stock powers with respect thereto to the extent, if any, required to vest title thereto in the Trustee; and

the sums of money (represented by checks) subsequently transferred in trust were likewise delivered to the Trustee in Wilmington, Delaware. At no time was title to any of the securities listed in Schedule A or any other securities or property subsequently held in the corpus of the trust transferred by the Trustee to Dora Browning Donner or to anyone else, except (a) such transfers as were from time to time in accordance with the direction of the advisor or advisors named in or designated pursuant to paragraph 5 (as amended from time to time) of the Trust Agreement, (b) such transfers as were effected subsequent to the death of Dora Browning Donner referred to in paragraph 8 hereof, and (c) the transfer of the \$75,000 to Dora Browning Donner referred to in paragraph 6 hereof.

4. At all times from and after the establishment of the trust, the Trustee has held the title to the assets comprising the trust either in its own name or in the name of nominees who were at all times under its control, that all of such assets have at all times been located within the State of Delaware, and that all acts of the Trustee in administering the trust have taken place within the State of Delaware.

5. The instruments executed by Dora Browning Donner on April 6, 1935, October 11, 1939, December 3, 1949 and July 7, 1950 (Exhibits 3, 4, 5 and 6 to the bill of complaint filed herein, respectively), under which Dora Browning Donner exercised the power of appointment granted to her by the Trust Agreement became effective upon their delivery to the Trustee in Wilmington, Delaware, on or about the dates indicated by the signature of the Trustee appearing at the bottom of each of such instruments.

[fol. 132] 6. Although by paragraph 10 of the Trust Agreement Dora Browning Donner reserved the right to amend, alter or revoke the Agreement in whole or in part, Dora Browning Donner never attempted to exercise such right, except for two amendments to paragraph 5 dealing with the advisor and its compensation and for the revocation of the trust as to \$75,000 on April 2, 1947, which amount was replaced in the trust on December 22, 1947.

7. At no time did Dora Browning Donner attempt to direct, suggest, consult with or advise the Trustee with respect to any phase of the administration of the trust, but on the contrary the Trustee performed all of its duties in accordance with its own best independent judgment, except in so far as it followed the instructions of the advisor or advisors acting in accordance with paragraph 5 of the Trust Agreement.

8. I am advised that Dora Browning Donner died on November 20, 1952, that on that date the Trustee held under the Trust Agreement assets having the aggregate values of \$1,493,649.91 and that between January 9, 1953 and March 30, 1953, the Trustee, acting pursuant to instruments executed by Dora Browning Donner on December 3, 1949, and July 7, 1950 (Exhibits 5 and 6 attached to the bill of complaint herein), transferred and delivered the following sums of money to the following:

Date	Amount	Distributed to
January 9, 1953	\$ 2,000	Miriam V. Moyer
January 10, 1953	1,000	Dorothy Doyle
January 12, 1953	1,000	Mary Glackens
January 12, 1953	1,000	Walter Hamilton
January 12, 1953	1,000	James Smith
January 12, 1953	1,000	Ruth Brenner
February 11, 1953	10,000	Bryn Mawr Hospital

Of the aforementioned persons, I am advised that Dorothy [fol. 133] Doyle, Mary Glackens, and Ruth Brenner were servants who had been in the employment of Dora Browning Donner for more than two years at the time of her death and hence were the persons entitled under paragraph 2(a)(iv) of the instrument dated December 3, 1949 to the payments so made to them. On March 30, 1953 the Trustee assigned, transferred and delivered securities and cash having an aggregate value of \$200,000 to the Delaware Trust Company, Trustee under Agreement dated November 26, 1948, with Elizabeth Donner Hanson, for Donner Hanson and others; and on March 30, 1953 the Trustee assigned, transferred and delivered securities and cash having an aggregate value of \$200,000 to the Delaware Trust Company, Trustee under Agreement dated November 26, 1948, with

Elizabeth Donner Hanson, for Joseph Donner Winsor and others; and in February, 1954, the Trustee deposited the sum of \$455,777.81 in the Wilmington Trust Company for the account of Elizabeth Donner Hanson, as Executrix under the Will of Dora Browning Donner.

9. On January 22, 1954 when the bill of complaint in this action was filed, the Trustee held under the Trust Agreement securities and monies all of which were located within the State of Delaware; and at all times since the institution of the action the Trustee has held securities and cash under the Trust Agreement in Wilmington, Delaware.

10. The Trustee has no office or other place of business outside of the State of Delaware and transacts no business outside of this State.

11. The Trust Agreement is one of two trust agreements between Dora Browning Donner and the Wilmington Trust Company under which the latter acted as Trustee, and at no time either before or after March 25, 1935 has Dora Browning Donner had an agency account of any kind with the Wilmington Trust Company.

[fol. 134] 12. When assets held under the Trust Agreement were purchased and sold it was not the practice of the Trustee to advise Dora Browning Donner of the transactions, but information as to portfolio changes were given to the advisor periodically every three months as is customarily done by the Wilmington Trust Company as Trustee under many other trusts in giving advice as to investment changes.

13. During the time when Donner Estates, Inc. (the name of which was subsequently changed to The Donner Corporation) was acting as advisor under paragraph 5 of the Trust Agreement, the individuals who acted on behalf of the corporate advisor in its relations with the Trustee were C. K. Baxter, John Stewart, H. R. Baxter and Edward V. Kruger.

14. Trustee was not advised that the validity or effectiveness of the Trust Agreement or the exercise of the

power of appointment thereunder was or would be disputed or assailed until after January 1, 1954, or more than one year after the date of death of Dora Browning Donner and consequently after the date when it was required to make distribution in accordance with the terms of the appointment dated December 3, 1949.

/s/ Joseph W. Chinn, Jr.

Sworn to and subscribed before me the day and year first above written.

/s/ Marian K. Graham, Notary Public, State of Delaware. My commission expires Oct. 7, 1956.

(N. P. Seal)

[fol. 135] On the 7th day of December, 1954, Certified Copy of Order of Court of Chancery for New Castle County, Delaware was filed in the words and figures following, to-wit:

CERTIFIED COPY

ORDER OF COURT OF CHANCERY
FOR NEW CASTLE COUNTY, DELAWARE

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

Civil Action No. 531

ELIZABETH DONNER HANSON, as Executrix and Trustee
under the Last Will of Dora Browning Donner, deceased,
Plaintiff.

v.

WILMINGTON TRUST COMPANY, et al., Defendants.

ORDER

AND NOW, to wit this 2nd day of December, 1954, the application of Edwin D. Steel, Jr., guardian ad litem for

Joseph Donner Winsor and Donner Hanson, to fix a date for hearing his motion for summary judgment in conformity with paragraphs (a), (b) and (c) of the prayers of the answer filed by him, having come on to be heard, and David F. Anderson, attorney for Delaware Trust Company, Trustee, and Caleb S. Layton, attorney for Wilmington Trust Company, Trustee, having appeared in support of said application, and Arthur G. Logan, acting for Josiah Marvel, attorney for Dora Stewart Lewis, Mary Washington Stewart Borie and Paula Browning Denckla, three of the defendants herein, and Robert B. Walls, guardian ad [fol. 136] litem for Dorothy B. R. Stewart, William Donner Denckla and Curtin Winsor, Jr., three of the defendants herein, having appeared in opposition to said application, and Arthur G. Logan, attorney as aforesaid, having advised the Court that he proposes to take depositions or file affidavits in opposition to said motion for summary judgment, and it appearing to the Court that it is desirable to defer the fixing of a date for a hearing on the aforesaid motion for summary judgment until after a reasonable opportunity has been given all parties to file in opposition to said motion for summary judgment such affidavits, depositions and other appropriate documents as they deem necessary for the effective resistance of said motion, and it appearing to the Court that pursuant to the order of the Court dated September 27, 1954 a special appearance has heretofore been entered on behalf of the defendants Dora Stewart Lewis, Mary Washington Stewart Borie and Paula Browning Denckla for the purpose of moving to dismiss the above action.

IT IS ORDERED by the Chancellor as follows:

1. That all of the parties to the above action may file on or before January 7, 1955 such affidavits, depositions or other appropriate documents as they deem necessary or desirable to oppose the motion for summary judgment filed by Edwin D. Steel, Jr., guardian ad litem for Joseph Donner Winsor and Donner Hanson; and
2. That the filing of any affidavits, depositions or other appropriate documents by the defendants Dora Stewart

Lewis, Mary Washington Stewart Borie and Paula Browning Donner for the purpose of opposing said motion for summary judgment shall not be deemed to change the character of the appearance previously entered on their behalf pursuant to the order of this Court dated September [fol. 137] 27, 1954.

s/ Collins J. Seitz
Chancellor

APPROVED AS TO FORM:

s/ Josiah Marvel by A.G.L.

Appearing specially for Dora Stewart
Lewis, Mary Washington Stewart Borie
and Paula Browning Denckla

s/ C. S. Layton

Attorney for Wilmington Trust Company
Trustee

s/ David F. Anderson

Attorney for Delaware Trust Company
Trustee

s/ R. B. Walls, Jr.

Guardian ad litem for Dorothy B. R.
Stewart, William Donner Denckla and
Curtin Winsor, Jr.

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

STATE OF DELAWARE,
NEW CASTLE COUNTY, ss.:

I, ROBERT A. STEVENSON, Register of the Court of Chancery of the State of Delaware, in and for New Castle County, do hereby certify that the foregoing is a true and correct copy of the ORDER signed by the Chancellor of the State of Delaware on the 2nd day of December, A. D. 1954. In the matter of ELIZABETH DONNER HANSON v. WILMINGTON TRUST COMPANY, et al., C. A. No. 531, as the same is on file and remains of record in this Court.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the Seal of said Court at Wilmington, this 2nd day of December, A. D. 1954.

/s/ Robert A. Stevenson
Register in Chancery

(Court of Chancery Seal)

[fol. 138]

CLERK'S NOTE

On the 5th day of January, 1955, Appearance of Edward McCarthy as associate counsel for the defendant Elizabeth Donner Hanson, as Guardian ad litem for the minor defendants, Joseph Donner Winsor and Donner Hanson, was filed before Judge C. E. Chillingworth.

IN CIRCUIT COURT OF FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH COUNTY, FLORIDA

SUMMARY FINAL DECREE—January 14, 1955

This cause was duly presented by counsel for the parties upon Motion for Summary Final Decree filed by plaintiff November 19, 1954 and Motion for Summary Decree filed by certain defendants on December 3, 1954.

Only questions of law are presented. The facts are simple and undisputed. No useful purpose would be served in stating them.

Two principal questions are presented, first, jurisdiction as against those whom a decree pro confesso has been entered; secondly, the authority of an executrix of a Florida will concerning certain assets now located in Delaware and purported to be held under a declaration of trust and power of appointment executed by the testator.

As to jurisdiction, the trust assets and the trustee are in Delaware. No personal service has been had upon the defendants who failed to answer. The inclusion of the trust assets in her inventory, and an allowance of counsel fees and compensation for the executrix, although such an inclusion was later sought to be withdrawn, does not

[fol. 139] of itself give this court jurisdiction over those assets in Delaware or the Trustees. Hence, this court considers that it has no jurisdiction over the non-answering defendants.

Concerning the declaration of trust dated March 25, 1935, and particularly the power of appointment dated December 3, 1949, no present interest passed to any beneficiary other than the Trustor (Testatrix). It seems clear to me, from the authorities, that the power of appointment was testamentary in character and did not constitute a valid inter vivos trust appointment. As the appointment had only one subscribing witness, rather than two, as required in Florida, it did not constitute a valid testamentary disposition. Hence, the executrix should receive the assets and dispose of them agreeable to the will under which she was appointed.

THEREUPON, IT IS ORDERED that this cause be dismissed, without prejudice, as to the non-answering defendants; that the Motion filed February 18, 1954, and the Motions for Summary Final Decree be granted to the extent embraced in this decree, and in other respects denied.

IT IS FURTHER ORDERED AND DECREED that, as to the parties now before the court, the assets held under the provisions of the trust agreement dated March 25, 1935, between the decedent, Dora Browning Donner, and Wilmington Trust Company, as Trustee, and additions thereto, passed under the will of Dora Browning Donner, dated December 3, 1949, and disposition thereof is determined by the residuary clause of the will, which was admitted to probate in the County Judge's Court, in Palm Beach County, December 23, 1952.

IT IS FURTHER ORDERED that this court retain jurisdiction for the purpose of enforcing this decree and the settlement of any other questions that may properly arise in connection herewith, all with costs taxed against the executrix.

[fol. 140] Copy furnished counsel.

DONE AND ORDERED this 14 day of January, A. D. 1955.

C. E. Chillingworth
Circuit Judge

IN CIRCUIT COURT OF FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH COUNTY, FLORIDA

PETITION FOR REHEARING—Filed February 1, 1955.

Come now the answering defendants by their undersigned attorneys and petition for a rehearing and reconsideration of the decree entered herein January 14, 1955, upon the following grounds:

1. While this Court correctly held that it had no jurisdiction over the nonresident defendants, it did not, in its opinion dated January 14, 1955, consider the fact that, under decided authorities, the nonresident trustees and nonresident appointees are indispensable parties, without whose presence this Court cannot give final effectual relief. See *McArthur v. Scott* (1884), 113 U. S. 340; *Winn v. Strickland* (1894), 34 Fla. 610; *Wilson v. Russ* (1880), 17 Fla. 691.

The general rule is stated in 34 Am. Jur. 458:

“Ordinarily, the trustee should and *must* be made a party to a suit to terminate or set aside a trust * * * (Italics added.)

In *Sadler v. Industrial Trust Company* (Mass. 1951), 97 N. E. 2d 169, the Supreme Judicial Court of Massachusetts dismissed a suit where both the trust res and the Trustee were outside that State even though *all* the beneficiaries of the trust were in the State and properly before the Court. The *Sadler* case is an exact authority and is highly persuasive in demonstrating that the Trustee must be before [fol. 141] the Court for any effectual decree to be rendered. The Court stated:

“In our opinion, the trustee is an indispensable party to any adjudication of the life beneficiaries’ interests under the trust. Justice requires that the trustee be a party, lest it raise the same question, for example, in an accounting with the same parties at a later date. * * * The Judge was right in dismissing the suits.

"No jurisdiction to enter a decree in personam against the trustee was acquired by service by registered mail and publication. (Citing *Pennoyer v. Neff*, supra)."

In *Findlay v. F. E. C. Railway Company* (D. C. Fla. 1933), 2 F. Supp. 393, aff'd (C. C. A. 5), 68 F. 2d 540, our District Court held that no binding decree could be rendered where the Court could not direct the conduct of non-resident Trustees, saying:

"The first matter to be determined, therefore, is whether or not there is a res within the jurisdiction of this court upon which a decree in rem may be imposed, that is, whether the situs of the trust estate, which is the subject matter of this suit, is in this judicial district so as to empower this court to construe the will and deal with the trust estate according to this court's interpretation of the will, as sought by plaintiff.

* * * * *

"This court is without power to construe the will, or to adjudicate by a decree in rem the rights, if any, of the railway company in the trust estate, as against these nonresident defendants, or against other non-resident beneficiaries under the will."

"Even if the residual estate is an equitable asset of the railway company, and even if plaintiffs' bonds, through the trust deed, are a lien upon it, *there is no res in this jurisdiction, there is no basis upon which this court may properly direct the conduct of the non-resident trustees with respect to the trust estate. Any attempt to do so would be a pure usurpation of power.*" (Italics added.)

This Court has properly held that neither the Delaware Trust Company nor Wilmington Trust Company is subject to its jurisdiction. Since they are indispensable parties, no effectual decree can be rendered by this Court.

Furthermore, none of the other appointees under the Trust have appeared and, as this Court stated in its opinion, [fol. 142] the Court has no jurisdiction as to them. But

the non-answering appointees are also indispensable parties. As stated in *Gulda v. Second Nat. Bank* (Mass. 1948), 90 N. E. 2d., 15 A. L. R. 2d. 605, where the Trustee was subject to the jurisdiction, but all the beneficiaries were not:

"In the instant case, however, the very existence of the trust itself * * * is threatened by the plaintiff, and those named as beneficiaries in the said declaration may be adversely and directly affected by the decree which may be entered. Their interests in the property are opposed to those asserted by the plaintiff. They are entitled to be heard in order to protect their rights and should not be compelled to depend on the defense made by the trustee."

This quotation demonstrated that where the validity of a trust is questioned, all interested persons, including both the Trustee and the beneficiaries are indispensable to the suit. The absence of numerous individual appointees, whose interest in the Trust amounts to approximately \$17,000, and of the Trustees, as well as possible undisclosed beneficiaries of the trusts of which Delaware Trust Company is Trustee, all of whom are indispensable parties, must necessarily prevent this Court from finally and effectually determining this litigation.

2. This Court erred in holding that no present interest passed to any beneficiary other than the Trustor. Plaintiffs correctly state the basic law covering the operation and effectiveness of a power of appointment as follows:

"A power of appointment relates back to the original trust instrument and the donee takes under the authority of the power as if the power and the instrument executing the power had been incorporated in one instrument." (Plaintiffs' Brief, p. 17a.)

See also *Wilmington Trust Co. v. Wilmington Trust Co.* (Del. 1942), 24 A 2d 309, 139 A. L. R. 1117; *Lederer v. Safe Deposit & Trust Co. of Baltimore* (Md. 1943), 35 [fol. 143] A. 2d 166. Therefore, on December 3, 1949, when Mrs. Donner exercised her reserved power, the appointees named in that instrument took vested interests in the

trust corpus created by the trust instrument of March 25, 1935. The fact that these interests might be divested by the exercise of a condition subsequent, namely, the Trustor's right to revoke, alter or amend, is immaterial. This is simply an application of the indisputable rule that the law favors the early vesting of estates. As stated by our Supreme Court in *Story v. First National Bank & Trust Co.* (1934), 115 Fla. 436, 156 So. 101:

"The law favors the early vesting of estates and in the absence of a clear intention of the testator to the contrary, estates are held to vest at the earliest possible date." See also *Krissoff v. First National Bank* (1947), 159 Fla. 522, 32 So. 2d 315.

The Restatement of Trusts, Paragraph (g) of the Comment under Section 56 makes this crystal clear.

"g. *Beneficiary ascertainable from non-testamentary act.*

"If the owner of property transfers it to another person in trust for such person as may be subsequently ascertained by a fact which is not a testamentary act, the requirements of the Statute of Wills need not be complied with. An act is not testamentary if an interest passes thereby to the beneficiary during the life of the settlor (see § 57) or if the act has significance apart from its effect upon the disposition of the interest (see § 54, Comment c).

Illustration:

8. A transfers certain securities to B in trust to pay the income to A for life and upon A's death to convey the securities to such person as may be designated in a letter to be delivered by A to B on the following day. On the following day A delivers a letter to B designating C as the person entitled to receive the securities on A's death. A valid trust for C is created, since an interest passes to C during the life of A."

The frequently cited case of *Leahy v. Old Colony Trust Co.* (Mass. 1950), 93 N. E. 238 supports this proposition.

[fol. 144] In that case the Supreme Judicial Court of Massachusetts stated:

"In this case it is not true that 'no interest' pass to any beneficiary other than Jennie M. Luhrs before her death, for the interest of all the beneficiaries vested at the creation of the trust, subject to being divested by the exercise of the reserved power to amend or revoke the indenture of trust. The reservation of that power did not make the trust testamentary."

See also *United B. & L. Association v. Garrett* (1946) 62 F. Supp. 460.

And our own Supreme Court commented in *Williams v. Collier* (1935), 120 Fla. 248, 158 So. 815:

"Whether the trust deed be regarded as creating or as declaring a trust, the dominant interest of the trustor as shown by the entire instrument was to make *a completed gift* of the principal of the bonds to his designated grandchildren. The reservation of the interest to accrue from the bonds did not affect the perfected gift of the principal. 65 C. J. 273. The other reservations were in effect a power relating to the custody and administration of the perfected trust fund." (Italics added.)

Since the plaintiffs admit and all the authorities support the proposition that the exercise of a reserved power of appointment fills in the blanks of the trust instrument, the conclusion is inescapable that the appointees named in the 1949 appointment took vested interests during Mrs. Donner's lifetime.

3. Assuming without admitting that the 1949 appointment required but lacked testamentary formalities, nevertheless, the trust agreement and the appointments are ratified, confirmed, and incorporated by reference into the Last Will and Testament of Dora Browning Donner, dated December 3, 1949. On the same day, December 3, 1949, when she appointed \$417,000 to the Bryn Mawr Hospital, her servants, and the Delaware Trust Company, as Trustee

for her two grandchildren, Dora Browning Donner executed her Will. In Paragraph 5 of her Will, she leaves [fol. 145] all her residuary estate to her Executrix and in Paragraph (a) she directs her Executrix:

“(a) Thereout to pay all estate, inheritance, transfer, or other succession taxes or death duties, State and Federal, which by reason of my death shall become payable upon or with respect to the *property appointed by me by exercise of the power of appointment provided in my favor in Paragraph 1 of a certain trust agreement* entered into between me and Wilmington Trust Company, a Delaware corporation, as trustee on the 25th day of March, 1935.” (Italics added.)

In Paragraph (b) of the Appointment of that date she directs the Wilmington Trust Company in turn:

“(b) As soon as conveniently may be, to pay the residue of the principal and undistributed income of the said trust fund held by it under the Trust Agreement to the Executrix of my Last Will and Testament to be dealt with by her in accordance with the terms and conditions of my said Last Will and Testament and any Codicil thereto.”

It follows, therefore, that Mrs. Donner, in her Will, recognized the trust agreement as an integral factor in the disposition of her property by directing her Executrix to pay taxes on the property appointed under the power. The two instruments must, consequently, be read together in order to give full affect to the intent of the Testatrix. This proposition is wholly supported by the case of *McHardy v. McHardy* (1857), 7 Fla. 301. In that case the decedent transferred all his property to a Trustee in trust for the payment of all his debts. His Will, made on the same day, declared his Last Will and Testament to be subject to the assignment in trust. In holding that the trust was validly incorporated into the Will, the Court said:

“Although the assignment might be objectionable about which it is not necessary to express an opinion,

this interpolation of its leading provision in the will adopts it and makes it a part of it, as if it were fully and entirely written out in the will. If a testator in his will refers expressly to any paper already written and has so described it that there can be no doubt of the identity, that paper, whether executed or not, makes part of the will, and such reference is the same as if he had incorporated it. *Habergham v. Vincent*, 2 Vessey, 228.

[fol. 146] This is an expression of the law as it exists today. The annotation in 21 A. L. R. 2d 221 states that a will duly executed and witnessed "may incorporate into itself, by appropriate reference, intent and identification, an existing written paper or document whether or not executed as a will or signed by the testator, and whether or not it has any validity in itself." The same annotation comments further that the "doctrine has been applied to wills incorporating by reference the terms of existing trusts." From the language used by Dora Browning Donner in her Last Will and Testament, it is apparent that she incorporated the March 25, 1935 trust agreement and subsequent appointments thereunder into her Will. Therefore, even if the original trust agreement and the appointments executed pursuant thereto are held to be testamentary, the fact that they were not executed in compliance with the Statute of Wills is of no importance since a nontestamentary document may be incorporated into a Will by reference.

4. Finally, we direct the Court's attention to the following compelling grounds, any one of which would give validity to the agreement of March 25, 1935 as an *inter vivos* trust:

(a) The form and execution of the agreement were accomplished with all of the formalities required for a valid contract. The protection of the Statute of Wills was not required.

(b) Legal title to the trust property passed to the Trustee with vested remainders in the appointees subject to Trustor's right to the income for life.

(c) Control over the trust property was at all times lodged in the trustee in conjunction with the investment adviser.

[fol. 147] (d) The dominant intent of the Trustor, evidenced not only by the agreement but reaffirmed by her Will and every living act, was to create a valid Trust.

We submit that the Court has the duty to recognize and give effect to the dominant and undisputed intent and wishes of the Trustor in disposing of her property.

Wherefore, aforesaid defendants move this Court for reconsideration of this case on rehearing and for modification of the judgment upon such rehearing.

Respectfully submitted,

/s/ Edward McCarthy

/s/ Manley P. Caldwell

Attorneys for Defendants aforesaid.

/s/ Wm. H. Foulk
Of Counsel

IN CIRCUIT COURT OF FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH COUNTY, FLORIDA

MOTION TO STRIKE—Filed February 17, 1955

The plaintiffs move the Court to strike the Petition for Rehearing filed by certain defendants herein on February 1, 1955, upon the grounds:

1. It is not in the form provided by law.
2. It violates the rules of pleading and practice.
3. Its effect is simply and solely to take issue with the correctness of Court's conclusions evidenced by the decree of January 14, 1955.

C. ROBERT BURNS
REDFEARN & FERRELL

By: /s/ C. Robert Burns
Attorneys for Plaintiffs.

[fol. 148] IN CIRCUIT COURT OF FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH COUNTY, FLORIDA

ORDER—March 3, 1955

This cause was duly presented by counsel after notice, and upon consideration thereof.

It is Ordered and Adjudged that the plaintiffs' motion to strike, filed February 17, 1955 be denied, and the petition for rehearing, filed February 1, 1955 be denied.

Copy furnished counsel.

Done and Ordered this March 3, A. D. 1955.

C. E. Chillingworth, Circuit Judge.

IN THE CIRCUIT COURT OF THE FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH COUNTY, FLORIDA

IN CHANCERY, No. 31,980

KATHERINE N. R. DENCKLA, individually, and ELWYN L. MIDDLETON, as guardian of the property of DOROTHY BROWNING STEWART, also known as Dorothy B. Stewart and Dorothy B. Rodgers Stewart, an incompetent person,
Plaintiffs,

v.

[fol. 149]. ELIZABETH DONNER HANSON, individually, as Executrix of the Will of DORA BROWNING DONNER, DECEASED, and as Guardian ad litem for JOSEPH DONNER WINSOR and DONNER HANSON, WILLIAM DONNER ROOSEVELT, individually, et al.

Defendants.

NOTICE OF APPEAL—Filed March 11, 1955

The defendants, Elizabeth Donner Hanson, individually, as Executrix of the Will of Dora Browning Donner, Deceased, and as Guardian ad litem for Joseph Donner Winsor and Donner Hanson, and William Donner Roosevelt, individually, take and enter their appeal to the Supreme Court of Florida to review the final Decree of the Circuit Court

of Palm Beach County, Florida, bearing date the 14th day of January, 1955, entered in the above styled cause and recorded in the records of said Court in Chancery Order Book 234, page 632, and all parties to said cause are called upon to take notice of the entry of this appeal.

Caldwell, Pacetti, Robinson & Foster, /s/ Manley P. Caldwell, Harvey Building, West Palm Beach, Florida; Attorneys for aforesaid Defendants.

McCarthy, Lane & Adams, /s/ Edward McCarthy, Atlantic National Bank Building, Jacksonville, Florida, Attorneys for Elizabeth Donner Hanson as Guardian ad litem for Joseph Donner Winsor and Donner Hanson.

/s/ William H. Foulk, Delaware Trust Building, Wilmington, Delaware, Of Counsel.

[fol. 150] CLERK'S CERTIFICATE to foregoing paper
(omitted in printing).

IN CIRCUIT COURT OF FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH COUNTY, FLORIDA

ASSIGNMENTS OF ERROR AND DIRECTIONS TO CLERK—
Filed March 21, 1955

Come now the Defendants Appellants, Elizabeth Donner Hanson, individually, as Executrix of the Will of Dora Browning Donner, Deceased, and as Guardian ad litem for Joseph Donner Winsor and Donner Hanson, and William Donner Roosevelt, individually, and files these their Assignments of Error and Directions to the Clerk relating to their Notice of Appeal entered herein March 11, 1955.

ASSIGNMENTS OF ERROR

1. The Court erred in entering the summary final decree herein dated January 14, 1955.
2. The Court erred in entertaining jurisdiction of this suit, although the Court does not have jurisdiction of the res nor of indispensable parties.
3. The Court erred in not dismissing this suit for lack of jurisdiction.

4. The Court erred in decreeing that the assets involved herein passed under the Will of Dora Browning Donner and that disposition thereof is determined by the residuary clause of said Will.

[fol. 151] 5. The Court erred in not decreeing that the Trust Agreement and exercises of powers of appointment involved herein are valid and effective and that the assets involved herein are not affected by the Will of Dora Browning Donner and did not become a part of the residuary estate of said Decedent.

6. The Court erred in denying petition for rehearing on March 3, 1955.

DIRECTIONS TO CLERK

In the preparation of the transcript of record in this cause, the Clerk of the above styled Court will please follow these directions:

1. Omit all certificates of service and certificates on copies.
2. Copy bill of complaint filed January 22, 1955, with accompanying exhibits.
3. Recite personal service of process January 29, 1954, on Elizabeth Donner Hanson, individually, and as Executrix of the Will of Dora Browning Donner, Deceased, and on Joseph Donner Winsor, Donner Hanson and William Donner Roosevelt.
4. Copy notice of suit filed January 22, 1954.
5. Recite proof of publication of notice of suit in Palm Beach Times on January 23, 30, February 6, 13, 1954.
6. Copy order appointing guardian ad litem, filed February 16, 1954.
7. Copy motion of Elizabeth Donner Hanson, etc., filed February 18, 1954.
8. Copy decree pro confesso, filed March 4, 1954.
9. Copy order appointing guardian ad litem, filed March 8, 1954.

[fol. 152] 10. Copy order filed April 9, 1954.

11. Copy Court Reporter's transcript, filed April 9, 1954.

12. Copy order of Supreme Court of Florida, filed July 1, 1954.

13. Copy answer of Elizabeth Donner Hanson, etc., filed August 3, 1954, and copy of Delaware complaint attached to it, but omitting the copies of exhibits attached to the Delaware complaint.

14. Copy motion to stay of Elizabeth Donner Hanson, etc., filed August 3, 1954.

15. Copy application for injunction and other relief, filed August 16, 1954.

16. Copy reply to application for injunction, filed August 20, 1954, and the exhibits attached thereto.

17. Copy answer of Wilbur E. Cook as Guardian ad litem, filed August 25, 1954.

18. Copy order discharging Wilbur Cook as Guardian ad litem, filed August 25, 1954.

19. Copy injunctive order and order on motions to stay, filed August 25, 1954.

20. Copy motion for summary final decree, filed November 19, 1954.

21. Copy answer of Paula Browning Denckla, filed November 22, 1954.

22. Copy corrected order of Supreme Court of Florida, filed November 26, 1954.

23. Copy motion of certain defendants for summary final decree filed December 23, 1954, and the exhibits attached thereto.

24. Copy certified copy of order of Court of Chancery of New Castle County, Delaware, filed December 7, 1954.

[fol. 153] 25. Recite appearance of Edward McCarthy as associate counsel for Elizabeth Donner Hanson, as Guardian ad litem, filed January 5, 1955.

26. Copy summary final decree, filed January 14, 1955.
27. Copy petition for rehearing, filed February 1, 1955.
28. Copy motion to strike, filed February 17, 1955.
29. Copy order denying petition for rehearing, filed March 3, 1955.
30. Copy notice of appeal, filed March 11, 1955.
31. Copy these assignments of error and directions to clerk, filed March 21, 1955.

Caldwell, Pacetti, Robinson & Foster, Attorneys for
aforesaid Defendants-Appellants.

CERTIFICATE OF SERVICE (omitted in printing).

[fol. 154] IN CIRCUIT COURT OF FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH COUNTY, FLORIDA

CROSS ASSIGNMENT OF ERROR—Filed March 28, 1955

Come now the appellees, Katherine N. R. Denckla, individually, and Elwyn L. Middleton, as guardian of the property of Dorothy Browning Stewart, also known as Dorothy B. Stewart and Dorothy B. Rodgers Stewart, an incompetent person, and file this their assignment of error relating to the notice of appeal filed herein on March 11, 1955.

1. The Court erred in its summary final decree dated January 14, 1955, in holding that it had no jurisdiction over the non-answering defendants.

ADDITIONAL DIRECTIONS TO THE CLERK

1. Copy this cross assignment of error and additional directions to the Clerk.

C. Robert Burns, Redfearn & Ferrell, By: C. Robert Burns, Attorneys for aforesaid Appellees.

CERTIFICATE OF SERVICE (omitted in printing)

[fol. 155] CLERK'S CERTIFICATE to foregoing
transcript (omitted in printing).

[fol. 157] IN THE SUPREME COURT OF THE STATE OF FLORIDA

ELIZABETH DONNER HANSON, Individually, and as Executrix of Will of Dora Browning Donner Deceased and as Guardian ad litem for DONNER HANSON and JOSEPH DONNER WINSOR, and WILLIAM DONNER ROOSEVELT, Individually,

Petitioners,

v.

KATHERINE N. R. DENCKLA, Individually, and ELWYN L. MIDDLETON, as Guardian of the Property of DOROTHY BROWNING STEWART, also known as Dorothy B. Stewart and Dorothy B. Rodgers Stewart, an incompetent person,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO REVIEW INTERLOCUTORY ORDER IN CHANCERY—Filed May 14, 1954

To Honorable Justices of the Supreme Court of Florida:

Your Petitioners, Elizabeth Donner Hanson, Individually, and as Executrix of Will of Dora Browning Donner, Deceased and as Guardian ad litem for Donner Hanson and Joseph Donner Winsor, and William Donner Roosevelt, Individually, respectfully show unto the Court as follows:

1. On January 22, 1954 Respondents Katherine N. R. Denckla, individually and Elwyn L. Middleton, as Guardian of the property of Dorothy Browning Stewart, also known as Dorothy B. Stewart and Dorothy B. Rodgers Stewart, an incompetent person, hereinafter called Respondents, filed in the Circuit Court for Palm Beach County, Florida, bill of complaint for a Declaratory Decree. Named as Defendants were Elizabeth Donner Hanson, individually and as Executrix of the Will of Dora Browning Donner, Deceased, and her children, Donner Hanson, Joseph Donner Winsor and William Donner Roosevelt, Wilmington Trust Company, a Delaware corporation, Delaware Trust Company, a Delaware corporation, and a number of other Defendants. (R. 1).

[fol. 158] 2. The bill of complaint seeks the construction of certain powers of appointment executed by Dora Browning Donner, pursuant to authority reserved by her in a revokable trust, which she created under date of March 25, 1935, with Wilmington Trust Company, Wilmington, Delaware, as Trustee. In the exercise of these powers she appointed \$200,000 to each of two trusts created by Elizabeth Donner Hanson with Delaware Trust Company, Wilmington, Delaware, as trustee, and \$17,000 to individual beneficiaries.

Distributions were made by Wilmington Trust Company, as Trustee, to the appointees within 12 months after the date of donor's death, on November 20, 1952, in accordance with the requirement of the appointment. At the date of death of the donor and the date of the commencement of this suit the \$417,000 were held outside the State of Florida by the Trustee and other appointees, none of whom were residents of or found within the State of Florida. (R. 48).

The bill of complaint asks for a declaration that the powers of appointment were invalid.

3. Personal service of process was obtained upon Elizabeth Donner Hanson, individually and as Executrix of aforesaid Will, Donner Hanson, Joseph Donner Winsor and William Donner Roosevelt. (R. 44). On February 16, 1954, Elizabeth Donner Hanson was appointed Guardian ad litem for her minor children, Donner Hanson and Joseph Donner Winsor. (R. 46).

Service by publication was sought upon the remaining Defendants, including Wilmington Trust Company and Delaware Trust Company. (R. 44, 47). None of the Defendants served by publication appeared nor filed defenses herein and decrees pro confesso were entered against them for failure to do so. (R. 51, 52).

4. On February 18, 1954 Elizabeth Donner Hanson, individually, as Executrix of the Will of Dora Browning Donner, Deceased and as Guardian ad litem for Donner Hanson and Joseph Donner Winsor, and William Donner Roosevelt, individually, who are hereinafter called Petitioners, filed sworn motion for dismissal of this suit, based upon grounds 1, 2, 4, 5 and 7 of Equity Rule 33(b). (R. 47).

[fol. 159]. This motion asserted that the Court lacks jurisdiction of the subject matter of this suit, because there is no res in the State of Florida which would afford a basis for constructive service upon the Defendants sought to be served by publication, particularly Wilmington Trust Company and Delaware Trust Company, in whose possession in Wilmington, Delaware the assets involved in the suit were located at the time of the death of the decedent and principally at the time of the institution of the suit, respectively; that the Executrix has never had any possession of said assets; and that Petitioners were informed and believed that the Defendants sought to be served with constructive service would not submit themselves to the jurisdiction of this Court.

Petitioners asserted that the exercise by the Court of the jurisdiction sought to be invoked by Respondents would contravene the Constitution and Laws of the State of Florida and the Constitution of the United States, and in particular Section 1 of the Fourteenth Amendment to the United States Constitution.

The motion also asserted that the Court lacks jurisdiction over the person of indispensable parties; that the purported process directed to indispensable parties is insufficient; that the purported service of process upon indispensable parties is insufficient and that Respondents failed to join indispensable parties by valid and legal process; all for the reasons set forth in detail under the first ground of the motion.

5. On March 16, 1954 Respondents served notice of calling up for hearing all undisposed of motions, which operated as an application for determination before trial of such motion. (R. 54). The motion came on for hearing before the Court on April 6, 1954. (R. 59). No counter affidavits, nor evidence in opposition to the above sworn motion, were presented at the hearing.

6. On April 9, 1954 the Court entered order holding that though the suit is primarily concerned with the validity and effect of certain powers of appointment rather than the will of aforesaid Decedent, it considered that the matters sought to be presented by aforesaid motion can best be determined

at final hearing. Accordingly, ruling upon this motion was postponed until trial and final hearing. (R. 55). [fol. 160] This order was stayed and superseded on April 23, 1954, pending these certiorari proceedings. (R. 66).

7. A certified transcript of the record of the pertinent proceedings in said cause is presented herewith, and made a part hereof.

8. Petitioners would further show unto the Court that they are greatly aggrieved by aforesaid order of the Circuit Court of April 9, 1954, postponing ruling upon aforesaid motion until trial and final hearing, and this Court should issue a writ of certiorari to review and reverse said order and correct the errors of said Court in entering said order for the reason that said order was not entered pursuant or in accordance with the essential requirements of law in the following respects:

(a) The Court should have granted said motion and should not have postponed ruling thereon until trial and final hearing and it abused its discretion in so postponing ruling thereon. By so postponing ruling on the jurisdictional question the Court has subjected Petitioners, Respondents and the Estate of Dora Browning Donner to the incurring of substantial expenses for attorneys' fees and costs in preparation of the case for trial on the merits and its trial, which would be unnecessary if it is held that the Court does not have jurisdiction in this suit.

(b) The motion should have been granted because it indisputably appears from the record herein that the grounds upon which said motion is based are valid and controlling; that the Court does not have jurisdiction of the subject matter of this cause nor does it have jurisdiction of indispensable parties hereto in that the assets which are the subject matter of this suit are not situated in Florida either physically nor constructively, nor have any of the parties holding said assets been personally served, nor have they submitted themselves to the jurisdiction of this Court.

Wherefore, the premises considered, Petitioners pray that this Honorable Court will grant to them a writ of

certiorari directed to and commanding the Clerk of the Circuit Court of Palm Beach County, Florida to transmit and certify to this Court the record and proceedings of said Court in said cause, including all pleadings and orders hereinabove referred to, and that this Honorable Court will [fol. 161] thereupon proceed to review the same and determine that the order entered April 9, 1954 is erroneous and void for the reasons pointed out, and that this Honorable Court will quash and set aside said order and direct the said Circuit Court to revoke and vacate said order and to grant Petitioners' motion and dismiss this suit, and that this Court shall grant unto Petitioners such other and further relief as to this Court may seem fit and proper.

/s/ Wideman, Caldwell, Pacetti & Robinson, /s/ Manley P. Caldwell, /s/ Madison F. Pacetti, 501 Harvey Building, West Palm Beach, Florida; Attorneys for aforesaid Petitioners.

[fol. 162] *Duly sworn to by Manley P. Caldwell, jurat omitted in printing.*

[fol. 164] IN THE SUPREME COURT OF THE STATE OF FLORIDA

[Title omitted]

PETITION FOR REHEARING.—Filed July 13, 1954

Come now, the Petitioners, Elizabeth Donner Hanson, etc., et al., by their undersigned attorneys, and as their Petition for Rehearing respectfully show unto the Court the following:

1. In the order of this Court entered herein June 29, 1954, denying the petition for writ of certiorari, this Court did not assign any reason for denying said petition. It is respectfully submitted that in view of the important jurisdictional question presented it would be helpful to the parties, counsel and the lower court, if the views of this Court on the points presented herein be set forth in an opinion on rehearing.

2. In denying the petition the Court overlooked its ruling in *Bohlinger v. Higginbottom* (April 1954) 70 So. 2d 913 (cited on page 4 of Petitioners' Reply Memorandum), wherein it was held "Courts are bound to take notice of the limits of their authority and if want of jurisdiction appears *at any stage of the proceedings* * * * the Court should notice the defect and enter an appropriate order." (Italics supplied).

It appears from the record herein that there is want of jurisdiction of the res and of the indispensable party holding the res, Delaware Trust Company. Accordingly, it is appropriate that this Court notice this defect and enter an order directing dismissal of the suit.

[fol. 165] 3. In postponing decision of the jurisdictional question the Circuit Judge failed to follow the emphasis of Equity Rule 33(d) and has imposed upon the parties and the Estate of the Decedent, Dora B. Donner, the heavy expense attendant upon preparation of this case for trial, and its trial. In so doing he failed to exercise sound, judicial discretion and therefore the order of postponement should have been quashed.

Reference is made to the argument of this point in Petitioners' Brief, pages 12 through 21, and the authorities therein cited. It is urged that this Court reread that portion of the Brief, which demonstrates that the exercise of sound, judicial discretion should result in the settlement of the jurisdictional question herein involved, at the outset of this case and not in the later stages thereof.

4. It clearly appears from the record that the Circuit Court does not have jurisdiction of this suit, nor of essential parties hereto. The assets of the Trust involved are neither physically nor constructively in Florida. They are held by Delaware Trust Company, a foreign corporation, which has not been personally served nor has it appeared herein. If the Court should proceed to final decree upon the merits in favor of Respondents, such decree would not be enforceable in Florida, because it could not be enforced against this indispensable party. To enforce the decree suit would be necessary in Delaware and, absent Florida jurisdiction, the decree would not be entitled to full faith and

credit. Relitigation would necessarily follow in Delaware. It is far better that the question be determined in the appropriate Court in Delaware, where the property is physically located, has its situs and where personal service of process can be obtained on the indispensable Trustee.

Reference is made to the argument on this point in pages 22 through 37 of Petitioners' Brief, and to the controlling authorities therein cited. It is urged that the Court reread this portion of the Brief, which demonstrates the utter lack of jurisdiction of the Circuit Court herein.

[fol. 166] Under these circumstances it is futile for the Circuit Court to be permitted to proceed with the case. The order postponing determination of the jurisdictional question should be quashed, with directions to decide this question for Petitioners by dismissal of the suit for lack of jurisdiction.

Wherefore, Petitioners move the Court for reconsideration of this case on rehearing on the points and issues set forth in this petition for rehearing, and for the quashing of aforesaid order, upon such rehearing.

Respectfully submitted,

/s/ Wideman, Caldwell, Pacetti & Robinson
/s/ Manley P. Caldwell, Attorneys for Petitioners.

CERTIFICATE OF SERVICE (omitted in printing).

[fol. 168] IN THE SUPREME COURT OF THE STATE OF FLORIDA

[Title omitted]

SECOND PETITION FOR WRIT OF CERTIORARI TO REVIEW INTER-
LOCUTORY ORDER IN CHANCERY—Filed September 28, 1954

To Honorable Justices of the Supreme Court of Florida:

Your Petitioners, Elizabeth Donner Hanson, Individually, and as Executrix of Will of Dora Browning Donner, Deceased and as Guardian ad litem for Donner Hanson and Joseph Donner Winsor, and William Donner Roosevelt, Individually, respectfully show unto the Court as follows:

1. This is the second petition for writ of certiorari to be filed in this Court in the above cause. The first petition was filed on May 14, 1954, seeking to review the interlocutory order of the Circuit Court of Palm Beach County entered April 9, 1954, postponing until final hearing ruling on the jurisdictional questions which the Petitioners had presented. By stipulation between counsel for the Petitioners and the Respondents filed herein September 2, 1954, it has been agreed that the record and briefs in the aforesaid first certiorari proceedings may be used in these proceedings insofar as they may be applicable to the same extent as if the same had been originally filed in the second proceedings.

[fol. 169] Accordingly, analysis of the proceedings in this case through said order of April 9, 1954, are not repeated in this petition, but reference is made to the petition in the first proceedings to the same extent as if the facts stated in said first petition were set out herein at length.

2. On June 29, 1954, this Court denied aforesaid petition. Petitioners, on July 13, 1954, filed herein petition for rehearing on said order, which petition for rehearing was denied by this Court on July 16, 1954.

3. A certified transcript of the record of the pertinent proceedings in said cause subsequent to the return thereof to the Circuit Court following the first certiorari proceedings has been filed herein, and is made a part of this petition. References herein to said transcript will be made as "2nd R." to distinguish the paging in said second transcript from the paging in the first transcript referred to in the first certiorari proceedings as "R.-".

On August 3, 1954, these Petitioners filed their answer to the bill of complaint herein (2nd R.-1), the presently material portions of which may be summarized as follows.

In Paragraph 11 of the answer (2nd R.-8) Petitioners aver that Elizabeth Donner Hanson as Executrix and Trustee, intending to meet Respondents' charge that she has failed to take steps to "capture" assets belonging to said Estate, and in order to expedite the final determination of the controversy raised by Respondents, on July 28, 1954 filed in the Court of Chancery of New Castle County, Dela-

ware, a complaint for declaratory judgment against Wilmington Trust Company as Trustee, Delaware Trust Company as Trustee, the Respondents herein and others, seeking determination as to the persons entitled to participate in the assets held in trust by Wilmington Trust Company under the Trust Agreement involved herein. Copy of said Delaware complaint was attached to the answer and made a part thereof (2nd R.-11).

Petitioners prayed that the Florida suit be stayed pending determination of the Delaware suit.

[fol. 170] 4. Concurrently with the filing of the answer Petitioners filed a separate motion to stay, setting up the pendency of the Delaware suit and moving for a stay of the Florida suit. (2nd R.-22).

5. On August 16, 1954 Respondents, the Plaintiffs in the court below, filed an application for injunction and other relief, alleging, with material inaccuracies, previous pleadings and orders in the suit, including the allegations in the answer concerning the pendency of the Delaware suit. They prayed for an injunction against Elizabeth Donner Hanson, Individually, as Executrix and as Trustee, enjoining her from further proceedings in the Delaware suit. (2nd R.-24).

6. On August 20, 1954, Petitioners filed a reply to said injunction application, correcting inaccurate allegations in said application. (2nd R.-30).

7. On August 25, 1954, after argument of aforesaid motion to stay and application for injunction, the Chancellor entered order denying the motion to stay and enjoining Mrs. Hanson from further prosecuting the Delaware suit until the further order of said Court. (2nd R.-56).

This order was stayed and superseded on September 1, 1954, pending these certiorari proceedings. (2nd R.-57, 58).

8. Petitioners would further show unto the Court that they are greatly aggrieved by aforesaid order of the Circuit Court entered August 25, 1954, denying Petitioners' motion to stay this suit and enjoining Elizabeth Donner Hanson from prosecuting aforesaid Delaware suit; that this Court should issue a writ of certiorari to review and reverse said order and correct the errors of said Court in entering

said order for the reason that it was not entered pursuant to or in accordance with the essential requirements of law in the following respects:

(a) The Court should have granted Petitioners' motion to stay and should not have denied the same. It appears from the record herein that the Circuit Court does not have jurisdiction of the subject matter of this cause nor does it have jurisdiction of indispensable parties hereto in that the assets which are the subject matter of this [fol. 171] suit are not situated in Florida either physically or constructively, nor have any of the parties holding said assets been personally served, nor have they submitted themselves to the jurisdiction of the Circuit Court. On the contrary, it appears from the record that the Court of Chancery of the State of Delaware in and for New Castle County, the County in which Wilmington Trust Company and Delaware Trust Company are situated, is the only Court (1) having jurisdiction of aforesaid Trusts, the Trustees and the trust assets, (2) which can appropriately and finally determine the validity of the exercises of powers of appointment herein involved and (3) whose decree would be entitled to full faith and credit under the Constitution of the United States. It further appears that continuance of the Florida suit would be oppressive, invalid, ineffective and unnecessary in view of the pendency of said Delaware suit, in which Respondents herein and the other interested parties can obtain appropriate and final determination and adjudication of their rights by a valid and enforceable judgment.

By not staying this suit the Court has subjected Petitioners, Respondents and the Estate of Dora Browning Donner to the incurring of substantial expenses for attorneys' fees and costs in preparation of the case for trial on the merits in Florida and its trial here, which are unnecessary in view of the pendency of the Delaware suit, and is unreasonably delaying the accounting and discharge of the Executrix.

(b) The Court should have denied Respondents' application for injunction and should not have enjoined Elizabeth Donner Hanson from prosecuting said Delaware suit,

for the same reasons assigned with respect to the error of the Court in denying Petitioners' motion to stay.

Wherefore, the premises considered, Petitioners pray that this Honorable Court will grant to them a writ of certiorari directed to and commanding the Clerk of the Circuit Court of Palm Beach County, Florida to transmit and certify to this Court the record and proceedings in said Court, subsequent to aforesaid first certiorari proceedings in this Court, including all additional pleadings and orders hereinabove referred to, and that this Honorable Court will thereupon proceed to review the same and [fol. 172] determine that the order entered August 25, 1954 is erroneous and void for the reasons pointed out, and that this Honorable Court will quash and set aside said order and direct the said Circuit Court to revoke and vacate said order and to grant Petitioners' motion to stay in this cause and to deny Respondents' application for injunction restraining the prosecution of said Delaware suit, and that this Court shall grant unto Petitioners such other and further relief as to this Court may seem fit and proper.

/s/ Wideman, Caldwell, Pacetti & Robinson,
/s/ Manley P. Caldwell, /s/ Madison F. Pacetti,
Attorneys for aforesaid Petitioners.

/s/ William H. Foulk, Of Counsel for Petitioners.

[fol. 173] *Duly sworn to by Manley P. Caldwell, jurat omitted in printing.*

[fol. 175] IN THE SUPREME COURT OF THE STATE OF FLORIDA

[Title omitted]

MOTION TO REMAND—Filed March 19, 1956

Come Now, Elizabeth Donner Hanson, as Executrix of the Will of Dora Browning Donner, deceased, individually and as Guardian ad litem of her children, Joseph Donner Winsor and Donner Hanson, and William D. Roosevelt, individually, Appellants herein, by their undersigned at-

torneys, and move this Court to remand this suit to the Circuit Court of Palm Beach County, Florida, with instructions to dismiss said suit on these grounds:

1. The Circuit Court of Palm Beach County in its summary final decree dated January 14, 1955, (R. 138), from which Appellants appealed to this Court, declared:

"As to jurisdiction, the trust assets and the trustee are in Delaware. No personal service has been had upon the defendants who failed to answer [including the Trustees having custody of the trust assets]. The inclusion of the trust assets in her inventory, and an allowance of counsel fees and compensation for the executrix, although such an inclusion was later sought to be withdrawn, does not of itself give this court jurisdiction over those assets in Delaware or the Trustees. Hence, this court considers that it has no jurisdiction over the non-answering defendants."

Said Court in said decree further declared:

"* * * the executrix should receive the assets and dispose of them agreeable to the will under which she was appointed."

[fol. 176] 2. Prior to the entry of said decree, to wit, on July 28, 1954, as more particularly set forth in paragraph 11 of the answer of Appellants filed in the lower Court, (R. 70) Appellant, Elizabeth Donner Hanson, as Executrix and Trustee under the last Will and Testament of Dora Browning Donner, deceased;

"* * * intending to meet plaintiff's charge that she had failed to take steps to 'capture' assets belonging to said estate and in order to expedite the final determination of the controversy raised by plaintiffs * * * filed in the Court of Chancery of the State of Delaware, in and for New Castle County, a complaint for declaratory judgment against Wilmington Trust Company as Trustee, Delaware Trust Company as Trustee, the plaintiffs in this suit, and others, as defendants, asking the Court to determine the persons entitled to par-

participate in the assets held in trust by Wilmington Trust Company under the [subject] trust agreement. * * * "

3. Plaintiffs Appellees in this present suit, namely, Katherine N. R. Denckla and Elwyn L. Middleton, as Guardian of the property of Dorothy B. Stewart, did not appear in said action in the Court of Chancery of the State of Delaware; but the respective daughters of the said Katherine N. R. Denckla and Dorothy B. Stewart, namely, Paula Browning Denckla and Dorothy Stewart Lewis and Mary Washington Stewart Borie, all of whom claim through and are in privity with their mothers, Plaintiffs Appellees herein, joined issue in said Delaware action and participated in the prosecution thereof. The Court of Chancery of the State of Delaware appointed Robert P. Walls, Jr., Esq. guardian ad litem for Dorothy B. Stewart and the said Robert P. Walls, Jr., Esq. appeared and actively participated in all of the proceedings before said Court. (Exhibits A, B, C, & E).

4. The Court of Chancery of the State of Delaware, after hearing the parties appearing before it and after giving due consideration to the proceedings and the summary final decree herein of the Circuit Court for Palm Beach County, [fol. 177] Florida, declared in an opinion dated December 28, 1955, (a certified copy of which is annexed hereto marked Exhibit A):

1. "Since the purported Trust was created in Delaware and since the assets have been held by the Trustees in Delaware at all times, the 'home' of the Trust is in Delaware and its validity must be determined by the law of Delaware." (Exhibit A, page 11).

2. "It is held that the Agreement of 1935 created a valid *inter vivos* Trust. Since the Trust was valid, the exercises of the power of appointment thereunder by the instruments of 1949 and 1950 were valid * * *. Accordingly, the distributions made by Wilmington Trust Company constituted a proper discharge of its duties as Trustee under its agreement with Mrs. Donner." (Exhibit A, page 21).

5. On January 13, 1955, the said Court of Chancery entered its judgment in said action (a certified copy of which is annexed hereto marked Exhibit B) finalizing the conclusions reached in its aforesaid opinion, entering judgment pro confesso against the defendants not appearing therein, including plaintiff appellee herein, Katherine N. R. Denckla, and specifically declaring that:

"All parties to this litigation are forever bound by the declarations, adjudications and determinations contained in subparagraphs (a) (b) (c) and (d) of paragraph (2) hereof." (Exhibit B, page 5).

In said subparagraphs, "it is expressly adjudged, declared and determined:

"(a) That by virtue of the Agreement of March 25, 1935 between Dora Browning Donner and Wilmington Trust Company, a copy of which is attached as Exhibit B to the Complaint filed herein, there was created a valid trust under the laws of the State of Delaware;

"(b) The execution and delivery by Dora Browning [fol. 178] Donner (sometimes referred to as Dora B. Donner) to the Wilmington Trust Company of the document dated December 3, 1949 (Complaint Exhibit C), and the execution and delivery by Dora Browning Donner to the Wilmington Trust Company of the document dated July 7, 1950 (Complaint Exhibit D), constituted valid and effective exercises of the power of appointment reserved to Dora Browning Donner under the agreement dated March 25, 1935, between Dora Browning Donner and Wilmington Trust Company (Complaint Exhibit B).

"(c) The payments referred to in paragraph 15 of complaint made by Wilmington Trust Company, Trustee under the agreement dated March 25, 1935 between Dora Browning Donner and Wilmington Trust Company, to Delaware Trust Company, Trustee under Trusts No. 9022 and 9023, in accordance with Paragraph 2(a) of the instrument dated December 3, 1949 (confirmed by paragraph 2 of the instrument dated July 7, 1950) were valid and proper payments and constituted a lawful discharge of Wilmington Trust Com-

pany's duty as Trustee under said Agreement of March 25, 1935. (Exhibit B, page 4).

"(d) In addition to the payments specified in the preceding subparagraph (c) each and every other distribution made by defendant Wilmington Trust Company of property held by it pursuant to said Agreement of March 25, 1935 between Dora Browning Donner and Wilmington Trust Company as set forth in Paragraph 15 of the Complaint were valid and proper distributions and constituted a lawful discharge of Wilmington Trust Company's duty as Trustee under said Agreement of March 25, 1935." (Exhibit B, page 14).

6. Subsequent to the entry of said Judgment on January 19, 1956, the said Paula Browning Denckla, Dora Stewart Lewis and Mary Washington Stewart Borie filed their motion for new trial contending inter alia that the Court failed to give full faith and credit to the summary final [fol. 179] decree of the Circuit Court of Palm Beach County, Florida (the decree appealed from herein) (a certified copy of said motion being annexed hereto marked Exhibit C). Said motion was denied by said Court after hearing by order dated January 25, 1956 (a certified copy of said order being annexed hereto marked Exhibit D).

7. The said Paula Browning Denckla, Dora Stewart Lewis and Mary Washington Stewart Borie, under date of February 15, 1956, filed their praecipe for a writ of error from the judgment of the Court of Chancery (a certified copy of which is annexed hereto marked Exhibit E), which appeal is still pending, unreversed and not superseded.

Petitioner is advised and avers that she is bound by the judgment of the Court of Chancery of the State of Delaware as hereinbefore set forth, and that she will be bound by the determination of the Supreme Court of Delaware on said appeal, said Courts having jurisdiction of the trust assets and the Trustees as found by the said Court of Chancery and the lower Court in this suit:

Wherefore, Appellants move this Court to remand this suit to the Circuit Court of Palm Beach County, Florida, with instructions to dismiss this suit.

/s/ Caldwell, Pacetti, Robinson & Foster, /s/ Manley P. Caldwell, Attorneys for Elizabeth Donner Hanson, Individually and as Executrix, and William D. Roosevelt.

/s/ Edward McCarthy, Attorney for Elizabeth Donner Hanson, Guardian ad litem.

/s/ William H. Foulk, Of Counsel.

CERTIFICATE OF SERVICE (omitted in printing).

[fol. 180] *Duly sworn to by Manley P. Caldwell, jurat omitted in printing.*

[fol. 181] EXHIBIT A TO MOTION TO REMAND

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE,
IN AND FOR NEW CASTLE COUNTY

Civil Action No. 531

ELIZABETH DONNER HANSON, as Executrix and Trustee under the Last Will of Dora Browning Donner, Deceased, Plaintiff,

v.

WILMINGTON TRUST COMPANY, a Delaware corporation, as Trustee, et al., Defendants.

December 28, 1955

Action for declaratory judgment. Upon cross-motions for summary judgment.

William H. Foulk, of Wilmington, for the plaintiff Elizabeth Donner Hanson, Executrix and Trustee Caleb S. Layton (of Richards, Layton & Finger) of Wilmington, for the defendant Wilmington Trust Company, Trustee

Edwin D. Steel, Jr. (of Morris, Steel, Nichols & Arsh) of Wilmington, Guardian Ad Litem for the defendants, Joseph Donner Winsor, Curtin Winsor, Jr. and Donner Hanson

Josiah Marvel, Arthur G. Logan and Aubrey B. Lank (of Logan, Marvel, Boggs and Theisen) of Wil-

mington, for the defendants, Dora Stewart Lewis, Mary Washington Stewart Borie and Paula Browning Denckla

Robert B. Walls, Jr., of Wilmington, Guardian Ad Litem for the defendants, Dorothy B. R. Stewart and William Donner Denckla

David F. Anderson (of ~~B~~rl, Potter and Anderson) of Wilmington, for the defendant Delaware Trust Company, Trustee

[fol: 182] HERRMANN, Acting Vice Chancellor:

The court is called upon to decide (1) whether the doctrine of collateral estoppel precludes the parties from litigating in this action the issue of the validity of a certain written agreement as an *inter vivos* trust agreement; and, if not, (2) whether the trust and the exercises of the power of appointment thereunder are valid or invalid.

This action for declaratory judgment was brought by Elizabeth Donner Hanson, Executrix and Trustee under the Will of Dora Browning Donner, to determine the persons entitled to assets valued at \$417,000. The assets were held at the time of the death of Mrs. Donner by the defendant Wilmington Trust Company under an Agreement entered into by them in 1935. After Mrs. Donner's death, the assets were distributed by Wilmington Trust Company to certain recipients named in Instruments executed by Mrs. Donner in 1949 and 1950 in the exercise of the power of appointment reserved to her under the Agreement of 1935.

The case is before the Court upon four motions for summary judgment. Three of the motions are based upon the contention that the Agreement of 1935 created a valid trust, that the power of appointment thereunder was validly exercised in 1949 and 1950; and that the distributions by Wilmington Trust Company pursuant thereto were properly made in discharge of its duty as Trustee under the Agreement. This is the position taken in the motions for summary judgment filed by the plaintiff,¹ by Wilmington

¹ The plaintiff has been barred from proceeding further herein by an injunction issued to her by the Circuit Court of the Fifteenth Judicial Circuit of Florida, in and for Palm Beach County, pursuant to the decree of that Court hereinafter discussed.

[fol. 183] Trust Company, Trustee, and Edwin D. Steel, Jr., Guardian Ad Litem for three minor defendants, Joseph Donner Winsor, Curtin Winsor, Jr. and Donner Hanson, grandchildren of Mrs. Donner. Opposed to this position is the cross-motion for summary judgment filed by the defendants Dora Stewart Lewis, Mary Washington Stewart Borie and Paula Browning Denckla, other grandchildren of Mrs. Donner. These defendants contend that by application of the doctrine of *res judicata* or collateral estoppel, or by reason of applicable principles of law, this Court must conclude that the Agreement of 1935 was an agency agreement and not a trust agreement; that, therefore, the Instruments of 1949 and 1950 were invalid testamentary acts and the transfer of assets by Wilmington Trust Company thereunder was erroneous because such assets should have been distributed under the Will of Mrs. Donner. These defendants cross-claim and seek a judgment against Wilmington Trust Company in the amount of \$417,000. The defendant Delaware Trust Company, Trustee, supports the motions of the proponents of the Trust. Robert B. Walls, Jr., Guardian Ad Litem for the defendants Dorothy B. R. Stewart and William Donner Denckla, incompetent daughter and minor grandson of Mrs. Donner, supports the motion of the opponents of the Trust. The pending motions are based upon the pleadings and exhibits thereto, affidavits, depositions and certified copies of the Florida proceedings hereinafter discussed.

There does not appear to be any genuine issue as to any of the following facts:

[fol. 184] Under the Agreement with Wilmington Trust Company, dated March 25, 1935, Mrs. Donner transferred to it certain designated securities. The Agreement provided that Wilmington Trust Company, as Trustee, should pay the net income of the trust fund to Mrs. Donner for life and, upon her death, should transfer the trust fund, free from the trust, "unto such person or persons * * * as Trustor shall have appointed by the last instrument in writing which she shall have executed and delivered to Trustee."

Thereafter, Mrs. Donner executed and delivered to Wilmington Trust Company an Instrument, dated December 3, 1949, in which, after revoking earlier Instruments by which she purportedly had exercised her power of appointment;

she again purported to exercise the power of appointment by directing that, upon her death, the Trustee should transfer the trust fund as follows: (1) \$4,000. to three named individuals; (2) \$1,000. to each of certain servants; (3) \$10,000. to Louisville Trust Company in trust for Benedict H. Hanson, a son-in-law of Mrs. Donner; (4) \$10,000. to the Bryn Mawr Hospital; (5) \$200,000. to the Delaware Trust Company in trust for Joseph Donner Winsor; (6) \$200,000. to the Delaware Trust Company in trust for Donner Hanson; and (7) the residue to the Executrix under Mrs. Donner's Will to be dealt with as stated therein. Mrs. Donner thereafter executed and delivered to Wilmington Trust Company an Instrument, dated July 7, 1950, which purported to partially revoke the Instrument of December 3, 1949 by deleting therefrom the provision for \$10,000. to the Louisville Trust Company, Trustee. In all other respects, the Instrument of 1950 confirmed the Instrument of 1949.

[fol. 185] At the time of the execution of the Agreement of 1935, Mrs. Donner was a resident of Pennsylvania. The securities referred to in the Agreement were delivered to Wilmington Trust Company in Delaware and they remained in Delaware in the possession of and under the administration of the Trust Company. Wilmington Trust Company has no place of business and transacts no business outside of Delaware.

When Mrs. Donner died in 1952, she was a resident of Palm Beach County, Florida, and had been such since 1944. The Will of Mrs. Donner, dated December 3, 1949, was probated there and the plaintiff herein, Elizabeth Donner Hanson, duly qualified as Executrix under the Will. After bequeathing her personal and household effects to Mrs. Hanson and Dora Donner Ide, two of her daughters, Mrs. Donner made the following disposition of the residue of her property "including any and all property, rights and interest over which I may have power of appointment which prior to my death has not been effectively exercised by me or has been exercised by me in favor of my Executrix": (1) Payment of all death taxes on property appointed by Mrs. Donner under the 1935 Agreement; and (2) the balance to be divided into two equal parts: (a) one part to Dela-

ware Trust Company in trust for Katherine N. R. Denckla, another daughter; and (b) the other part to Mrs. Hanson in trust for Dorothy B. Rodgers Stewart, another daughter, during her lifetime and after her death to Delaware Trust Company in trust for Mrs. Denckla.

When Mrs. Donner died, the securities and cash held by Wilmington Trust Company under the 1935 Agreement amounted to \$1,493,629.91. Thereafter, Wilmington Trust Company distributed cash and securities aggregating [fol. 186] \$417,000, in accordance with the provisions of the Instruments of 1949 and 1950 and deposited the balance to the account of Mrs. Hanson as Executrix and Trustee under the Will of Mrs. Donner. None of the trust funds distributed to Delaware Trust Company, Trustee, have ever been held or administered outside of Delaware.

In January 1954, Mrs. Denckla and Elwin L. Middletop, guardian of the property of Mrs. Stewart, brought an action in the Circuit Court of Palm Beach County, Florida, against Mrs. Hanson, individually and as Executrix of Mrs. Donner's Will, Wilmington Trust Company, Delaware Trust Company and others who were interested in the assets, directly or beneficially, by reason of appointment or the residuary clause of the Will. The Florida action sought a declaratory judgment determining what passed under the Will and the authority of the Executrix over the assets held by Wilmington Trust Company under the 1935 Agreement. Neither Wilmington Trust Company, Delaware Trust Company nor any of the other appointees under the Instrument of 1949, named defendants in the action, were served personally and they did not appear in the action. None of the assets held by Wilmington Trust Company under the Agreement of 1935 have ever been held or administered in Florida. On January 14, 1955, a "summary final decree" was entered by the Florida Court holding (1) that the Court lacked jurisdiction over the assets in Delaware and over Wilmington Trust Company, Delaware Trust Company, and the other non-answering defendants and that the complaint be dismissed without prejudice as to all such defendants; and (2) that no present interest passed to any beneficiary other than Mrs. Donner under the Agreement of 1935 and the [fol. 187] Instrument of 1949 and that the Instrument was

testamentary in character and invalid as a testamentary disposition because it was not subscribed by two witnesses as required by Florida law; and (3) that, therefore, as to the parties before the Florida Court, the assets held by Wilmington Trust Company under the Agreement of 1935 passed under the residuary clause of Mrs. Donner's Will.

In the meanwhile, in July 1954, the instant action was begun by Mrs. Hanson as Executrix and Trustee under Mrs. Donner's Will. Named herein as defendants are Wilmington Trust Company as Trustee, Delaware Trust Company as Trustee, the appointees named in the Instruments of Appointment executed by Mrs. Donner, residuary legatees under Mrs. Donner's Will and others having beneficial interests. The complaint herein alleges that it was filed because of the desire of the Executrix to settle the matters in controversy finally and conclusively "as to all parties so that she may effectively perform all of her duties, account as Executrix and enter upon her duties as Trustee." The complaint alleges that no part of the assets involved were located in Florida and that Wilmington Trust Company, Delaware Trust Company and certain other indispensable parties were not before the Florida Court; that, therefore, that Court could not render "an effective and binding decree." The prayer of the complaint in this action is that this Court determine by declaratory judgment the persons who, at the time of Mrs. Donner's death, were entitled to participate in the assets held in trust by Wilmington Trust Company under the 1935 Agreement:

[fol. 188]. I. *Collateral Estoppel*

The first question to be decided is whether by reason of the Florida decree, the parties hereto are precluded from litigating in this action the issue of the validity of the Agreement of 1935 as a trust agreement. This is the ultimate question because the validity of the exercises of the power of appointment depends, in this case, upon the validity of the basic Agreement. See *Wilmington Trust Company, et al. v. Wilmington Trust Company, et al.*, 26 Del. Ch. 397, 24 A. (2d) 309, 312.

The opponents of the Trust assert the doctrine of *res judicata* and collateral estoppel. The doctrine of *res*

judicata is not applicable because the Florida action and this action involve different causes of action. The refinement of the *res judicata* doctrine known as the doctrine of collateral estoppel may be applicable, however, the difference in causes of action notwithstanding. See *Niles v. Niles*, — Del. Ch. —, 111 A. (2d) 697; *Petrucchi v. Landon*, — Terry —, 107 A. (2d) 236; Scott, "Collateral Estoppel by Judgment", 56 Harv. L. Rev. 1. The question, then, is whether the doctrine of collateral estoppel may be invoked as an affirmative defense by the opponents of the Trust to preclude the other parties from obtaining a determination by the courts of this State as to the validity of the Trust. I am of the opinion that this question must be answered in the negative.

The Florida Court made determinations incidentally that it would not have had the jurisdiction to make directly. The action before the Florida Court was brought to determine what passed under the residuary clause of the Will of [fol. 189] Mrs. Donner, a Florida domiciliary. As necessary but incidental determinations in that action, the Florida Court concluded that the Agreement of 1935 was invalid as a trust agreement and that, therefore, the exercise of the power of appointment in 1949 was testamentary.²

In a direct proceeding, the Florida Court would not have had the jurisdiction to determine the essential validity of an *inter vivos* trust created in Delaware, all of the assets of which were in Delaware and the Trustee of which is a Delaware corporation which was not before the Court. Since neither the Trust *res* nor the Trustee were within the jurisdiction of the Florida Court, it is clear that that Court could not have determined the essential validity of the purported Trust in a direct proceeding brought for the purpose. 54 Am. Jur. "Trusts" §§564, 584; *Lines v. Lines*, 142 Pa. 149, 21 A. 809; compare *In re Hurriman's Estate*, 124

² The decree of the Florida Court contained no expressed conclusion regarding the invalidity of the agreement of 1935 as an agreement of trust. Since, however, such determination must have been made before the Court could reach the expressed conclusion that the exercise of the power was testamentary, the prerequisite determination as to the invalidity of the Agreement must be said to be implicit in the decree.

Misc. Rep. 320, 208 N.Y.S. 672; *Harvey, et al. v. Fiduciary Trust Co., et al.*, 299 Mass. 457, 13 N.E. (2d) 299; *Land, "Trusts in the Conflict of Laws"*, Secs. 41, 43.

The principle is settled that where a court has incidentally determined a matter which it would have had no jurisdiction to determine directly, the judgment is not conclusive in a subsequent action brought to determine directly such [fol. 190] incidental matter. In his important and widely quoted discussion of "*Collateral Estoppel by Judgment*", 56 Harv. L. Rev. 1, 18, Professor A. W. Scott states:

" * * * . It may happen, however, that the court has jurisdiction to determine the cause of action, but that in determining it the court must necessarily decide a question which it would have no jurisdiction to determine in an action brought expressly for its determination. In such a case the judgment of the court is valid, and the cause of action will be extinguished, the judgment operating by way of merger or bar. The question then arises as to the effect by way of collateral estoppel of the determination of the particular matter on which the judgment was based. Although the authorities are somewhat meager, it seems clear that the judgment should not preclude the parties as to the matter in a subsequent action between them brought expressly to determine the matter in a court which has jurisdiction to determine it. It seems clear, also, that after such determination in a subsequent suit, it is the determination of the court in that suit, and not the incidental determination in the prior suit, which is conclusive between the parties."

See also *Restatement of Judgments*, § 71; *Petrucchi v. Landon, supra*; dissent of Rutledge, J. in *Geracy v. Hoover*, 77 U.S. App. D.C. 55, 133 F. (2d) 25, 147 A.L.R. 185.

In the final analysis, the question becomes one of public policy. At 56 *Harv. L. Rev.* 1, 22, Professor Scott states:

"The question in all these cases is one of public policy. Should a court which has not been entrusted with jurisdiction to determine a matter directly be permitted to determine it incidentally, not merely for the purpose

of deciding the controversy which it can properly decide, but also with the effect of precluding the parties from litigating the question in those courts which alone are entrusted with jurisdiction to determine it directly?"

[fol. 191] This eminent authority on the subject concludes with the admonition that the application of the doctrine of collateral estoppel must always be based upon a sound public policy and that care "must be exercised in its application to see that it works no injustice."

It is my opinion that it would be contrary to sound public policy for this Court to consider itself bound and divested of its duty to determine the essential validity of a Delaware *inter vivos* trust in a direct proceeding brought for the purpose on the ground that a Court in a sister jurisdiction has incidentally determined the matter in another cause of action in which neither the trust *res* nor the Trustee was before the Court. The doctrine of collateral estoppel is a judge-made rule; I do not think that it should be enlarged to the extent of depriving the parties herein of a direct determination by this Court as to the validity of the Trust.

Since the purported Trust was created in Delaware and since the assets have been held by the Trustees in Delaware at all times, the "home" of the Trust is in Delaware and its validity must be determined by the law of Delaware. *Wilmington Trust Company, et al. v. Wilmington Trust Company, et al., supra; Wilmington Trust Company v. Sloane*, 30 Del. Ch. 103, 54 A. (2d) 544. This is a case of first impression in this State as to an important phase of the question of the validity of the Trust. The law of this State must be formulated here. It would be contrary to public policy for the Courts of this State to relinquish their duty of enunciating the law controlling a trust having its situs in Delaware [fol. 192] and to thereby relegate the Trustee and the Trust *res* here involved to the law prevailing in another jurisdiction. Compare *Taylor, et al. v. Crosson, et al.*, 11 Del. Ch. 145, 98 A. 375.

Moreover, the application of the doctrine of collateral estoppel might work injustice in this, a case which involves only questions of law. It could mean that the parties who

were before the Court in the Florida action would be subjected to one conclusion of law while Wilmington Trust Company, Delaware Trust Company and other appointees and beneficiaries, who did not appear in the Florida action, would be controlled by a different rule of law. This could mean that (1) as to the parties before the Florida Court, the disposition of assets would be governed by the residuary clause of the Will, but (2) as to the parties who were not before the Florida Court, the disposition of assets would be governed by the terms of the 1935 Agreement and the exercises of the power of appointment thereunder. This would result in chaos and injustice. The possibility of such result militates against application of the doctrine of collateral estoppel in any case. See *Restatement of Judgments*, § 70 and com. f, 1948 Supp.; Scott "Collateral Estoppel by Judgment", 56 Harv. L. Rev. 1, 10.

The opponents of the Trust place principal reliance upon *Niles v. Niles*, *supra*. That case is not applicable because there the issue previously determined incidentally by the New York Court also arose incidentally before the Chancellor. I do not consider anything stated herein to be in conflict with the decision in the *Niles* case. The other cases [fol. 193] cited by the opponents of the Trust have been examined and have been found to be inapposite. See *Slater v. Slater*, 372 Pa. 519, 94 A. (2d) 750; *Ugast v. LaFontaine*, 189 Md. 227, 55 A. (2d) 405; *United States v. Silliman* (C.C.A. 3) 167 F. (2d) 607; *William Whitman Co. v. Universal Oil Products Co.* (D.Del.) 92 F. Supp. 885; *United States v. Moser*, 274 U.S. 225, 47 S.Ct. 616.

It is concluded that no determination made in the Florida action is conclusive in this action as to the validity of the Agreement of 1935 as a trust agreement. The parties herein will not be precluded by the defense of collateral estoppel from obtaining the decision of this Court upon that issue.

II. Essential Validity of the Trust Agreement

In order to determine the essential validity of the Agreement of 1935 as a trust agreement, it is necessary to consider its pertinent provisions in some detail.

The Agreement was a formal document, executed by Mrs. Donner and Wilmington Trust Company, in which Mrs.

Donner was referred to as Trustor and Wilmington Trust Company was referred to as Trustee. It was recited that the Trustor "desires to establish a trust of certain securities and property" referred to as the "trust fund". It was stated that the Trustor thereby "assigned, transferred and delivered" certain listed securities and property to the Trustee in trust to "hold, manage, invest and reinvest the trust fund, collect the income thereof and pay out of such income all taxes, charges and expenses payable thereout". The Agreement provided for the payment of the net income of [fol. 194], the trust fund to the Trustor during her lifetime and, upon her death, the Trustee was directed to convey the fund "free from this trust, unto such person or persons and in such manner and amounts and upon such trusts, terms and conditions as Trustor shall have appointed by the last instrument in writing which she shall have executed and delivered to Trustee"; or in the absence of such instrument, "by her Last Will and Testament, or in default of any such appointment then unto the then living issue of Trustor, per stirpes and not per capita". In default of exercise of the power of appointment and living issue, the fund was to go to the Trustor's next of kin. The Agreement then conferred upon the Trustee all of the ordinary general and broad powers usually conferred upon a Trustee, including the power to retain any and all stocks and securities, to sell and exchange the same, to invest the proceeds of any sales, to vote stock, to participate in reorganizations, to determine whether expenses and other disbursements shall be charged against income or principal, and to hold bearer securities in its own name or in the name of its nominees. It was provided, however, that the Trustee shall exercise its power to sell or exchange trust property, to invest the proceeds of any such sale or other available money and to participate in plans of reorganization, merger, etc., only upon the written direction of, or with the written consent of the Adviser of the trust; provided that if there should be no Adviser, or if the Adviser should fail to act within a ten day period, the Trustee might exercise all such powers [fol. 195] and "take such action in the premises as it, in its sole discretion, shall deem to be for the best interest of the beneficiary of this trust". The Trustor named as Adviser

her husband or "such other person or persons as Trustor may nominate in writing delivered to Trustee during her lifetime". The Trustor reserved the right to amend or revoke the Trust Agreement in whole or in part and, further, she reserved the right to change the Trustee.

Thus, by the Agreement of 1935, Mrs. Donner reserved to herself the following significant rights and powers: (1) the right to all of the net income for life; (2) the right to amend or revoke the Agreement in whole or in part; (3) the right to change the Trustee; (4) the right to name and change an investment Adviser. The question here presented revolves about those reservations. The opponents of the Trust contend that the cumulation of the reservations created an agency relationship between Mrs. Donner and the Wilmington Trust Company and not a trust relationship; that, therefore, the disposition, insofar as it was intended to take effect after Mrs. Donner's death, was testamentary and invalid for failure to comply with the Florida law relating to the validity of Wills.

It is my opinion that under the law of this State, which governs the essential validity of the Agreement of 1935 as a trust agreement, the reservations of rights and powers made therein by Mrs. Donner did not defeat the *inter vivos* trust she so clearly intended to create by that Instrument. [fol. 196] The law seems settled as to the first three reservations here involved. *Equitable Trust Co. v. Paschall, et al.*, 13 Del. Ch. 87, 115 A. 356, stands for the proposition that the reservation of a life interest plus the reservation of the power to revoke an *inter vivos* trust does not invalidate the trust. See also 1 *Scott on Trusts*, § 57.1; *Restatement of Trusts*, § 57; 1 *Bogert, Trusts and Trustees*, p. 483; *Leahy v. Old Colony Trust Co.*, 326 Mass. 49, 93 N.E. (2d) 238. Furthermore, the power of the settlor of an *inter vivos* trust to change the trustee has judicial sanction in this State. See *Wilmington Trust Co., et al. v. Wilmington Trust Co., et al.*, *supra*.

The brunt of the attack on the Agreement of 1935 is centered upon its provisions for the appointment of an investment Adviser and the requirement that the Trustee be governed by the Adviser as to (1) any sale or exchange of trust property; (2) any investment of the proceeds of such

sale or of other available money; and (3) any participation in plans of reorganization, merger, etc., of any company in which the Trustee might hold securities. It appears that the effect of such provisions upon the validity of an *inter vivos* trust has not been directly decided in this State.

It seems to be settled that an intended *inter vivos* trust does not become testamentary because the trustor reserves the power to direct the trustee as to the making of investments. See *Restatement of Trusts*, § 57(2) and comment thereon; 1 *Scott on Trusts*, § 57.2 1 *Bogert, Trusts and Trustees*, § 104; *National Shawmut Bank of Boston v. Joy*, 315 Mass. 457, 53 N.E. (2d) 113, 125. If the trustor may personally direct or veto investments by the trustee without impairing the validity of an *inter vivos* trust, it would [fol. 197] seem to follow that the trustor may assign that authority to a third party, called "adviser", without destroying the validity of the trust. Such investment counselor has been considered to be a fiduciary, a co-trustee or a quasi-trustee. See *Gathright's Trustee v. Gaut*, 276 Ky. 562, 124 S.W. (2d) 782 and *Annotation* 120 A.L.R. 1407; *Restatement of Trusts*, § 185; *Scott on Trusts*, § 185; 1 *Bogert, Trusts and Trustees*, p. 536. In *Equitable Trust Co. v. Union National Bank*, 25 Del. Ch. 281, 18 A. (2d) 288, this Court found it unnecessary to determine whether or not an investment adviser was a fiduciary. Whatever the precise relationship between the Trustor and the Adviser or the Trustee and the Adviser may be called, I think it is clear that if Mrs. Donner might have reserved to herself the power to specify investments and to direct or veto the Trustee as to investment policy, without impairing the validity of the *inter vivos* Trust, she may properly delegate that power to another without destroying the *inter vivos* Trust she so clearly intended to create.

The intent of the Trustor is a critical and controlling factor in determining whether an agency or a trust was created by the Agreement of 1935. See 1 *Scott on Trusts* (1954 Supp.) § 57.2, p. 74. It is beyond question, I think, that it was Mrs. Donner's intent that the 1935 Agreement should create an *inter vivos* trust. In the document, she called herself "Trustor", she called Wilmington Trust Company "Trustee" and she referred to the "trust fund" she was thereby conveying to the Trustee.

[fol. 198] It appears that there is no established limit to the nature of extent of the powers which the settlor of a valid *inter vivos* trust may reserve so long as the settlor does not reserve the right to control the trustee as to the details of the administration of the trust. If, however, the settlor reserves such power to control the trustee as to the details of the administration of the trust as to make the trustee a mere agent of the settlor, the disposition may be testamentary so far as it is intended to take effect after the settlor's death. See *Restatement of Trusts*, § 57(2); *1 Bogert, Trusts and Trustees*, § 104, p. 490.

In the Agreement of 1935, Mrs. Donner did not reserve to herself control over the details of the administration of the Trust as would constitute the Trustee an agent under the principle above stated. In the Agreement, she conveyed title and broad powers to the Trustee limited only by the obligation of the Trustee to consult and follow the advice of the investment counselor. The opponents of the Trust contend, however, that an examination of the actual operation of the Trust Fund, as disclosed by affidavits and depositions, reveals that the Trustee permitted the Adviser to usurp all of its powers and functions as to the details of administration and that, in reality, the Trustee was nothing more than a custodian of the securities.

Under the circumstances of this case, the *modus operandi* adopted by the Trustee and the Adviser is immaterial to the question of whether the Agreement of 1935 created a [fol. 199] relationship of trust or of agency. In the absence of ambiguity, fraud, duress or mistake, the intent of the Trustor and the nature of the relationship created by the Agreement of 1935 is to be determined from the face of the Instrument itself. See *Restatement of Trusts*, § 38(2), Comment a: There is no showing that Mrs. Donner knew of the facts relied upon by those who assert an agency instead of a trust, nor is there any showing that she was in any way responsible for any surrender of function which may have taken place as between the Trustee and the Adviser in the operation of the trust. Even if we disregard its vigorous denials and assume that the Trustee abandoned its powers and duties to the Adviser, as asserted by the opponents of the Trust, such situation would not convert a trust agree-

ment into an agency agreement in the absence of the knowledge or consent of Mrs. Donner. A trustor, intending to create an *inter vivos* trust, may not be thwarted by an *ex parte* act or failure to act on the part of the trustee.

It is manifest upon the face of the Agreement that an *inter vivos* trust was intended. Effect will be given to the Agreement in accordance with its plain terms so that the clear intent of the Trustor will not be defeated.

The opponents of the Trust place principal reliance upon *Restatement of Trusts*, § 56; *In re Pengelly's Estate*, 374 Pa. 358, 97 A. (2d) 844; *Frederick's Appeal*, 52 Pa. 338; and *Hurley's Estate*, 16 Pa. D.&C. 521. In *Restatement of Trusts*, § 56, it is stated that if no interest passes to the beneficiaries before the death of the settlor, the intended trust is testamentary. That principle is not applicable in [fol. 200] the instant case because present interests were created at the time of the execution and delivery of the Agreement of 1935 and the exercises of the power of appointment thereunder. The agreement provided for an ultimate disposition of the assets to "then living issue of Trustor", subject to defeasance by revocation or exercise of the power of appointment. Present interests were thus created when the Agreement and exercises thereunder were executed, even though such interests could not fall into possession until after the death of Mrs. Donner and even though such interests might be ultimately defeated by further exercise of the power of appointment or by revocation. See 1 *Bogert, Trusts and Trustees*, pp. 480-483; *Restatement of Property*, § 157, Comments P, Q, and R; *Gray on Perpetuities*, § 112; *Simes, Future Interests*, § 80; *Leahy v. Old Colony Trust Co.*, *supra*. Since present interests passed under the Agreement and the exercises of the power of appointment and only the enjoyment thereof was postponed until the Settlor's death, the *inter vivos* trust here is not defeated by application of the principle stated in § 56 of the *Restatements of Trusts*. See *Brown v. Pennsylvania Company*, 2 W.W. Harr. 525, 126 A. 715; *Security Trust & Safe Deposit Co. v. Ward*, 10 Del. Ch. 408, 93 A. 385; *Wilmington Trust Co., et al. v. Wilmington Trust Co., et al.*, *supra*; *Restatement of Trusts*, § 57 (1); 1 *Scott on Trusts*, § 57.1.

The case of *In re Pengelly's Estate, supra*, does not aid the opponents of the Trust because that case is distinguishable on its facts. There it was found by the Court that the trust instrument merely continued a previously existing [fol. 201] agency relationship and the Settlor had reserved complete power to control the Trustee in the administration of the trust. Moreover, the Court in the cited case was concerned with the public policy requiring protection of the rights of widows. The cases of *Frederick's Appeal, supra* and *Hurley's Estate, supra*, are likewise clearly distinguishable on their facts and of no assistance.

It is held that the Agreement of 1935 created a valid *inter vivos* Trust. Since the Trust was valid, the exercises of the power of appointment thereunder by the Instruments of 1949 and 1950 were valid. *Wilmington Trust Co., et al. v. Wilmington Trust Co., et al., supra*. Accordingly, the distributions made by Wilmington Trust Company constituted a proper discharge of its duties as Trustee under its Agreement with Mrs. Donner.

The motions for summary judgment filed by the Lewis defendants will be denied. The other motions for summary judgment filed herein will be granted.

[fol. 202] STATE OF DELAWARE,
KENT COUNTY, ss.:

I, T. E. Townsend, Jr., Clerk of the Supreme Court of the State of Delaware, do hereby certify that the foregoing is a true and correct copy of Item #68 of the Record in the cause

Dora Stewart Lewis, et al., :

v. : No. 8, 1956

Elizabeth Donner Hanson :

as the same remains on file and of record in said Court.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Court at Dover this 6th day of March A. D. 1956.

/s/ T. E. Townsend, Jr.
Clerk of the Supreme Court.

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

Civil Action No. 531

ELIZABETH DONNER HANSON, as Executrix and Trustee under the Last Will of Dora Browning Donner, deceased,
Plaintiff,

v.

WILMINGTON TRUST COMPANY, a Delaware corporation, as
Trustee, et al., Defendants.

JUDGMENT

AND NOW TO-WIT this 13th day of January, A. D. 1956, the above entitled action for a declaratory judgment and other and further relief having been referred for hearing and determination to the Honorable Daniel L. Herrmann as Acting Vice Chancellor by order of July 19, 1955; and having come on to be heard upon (1) the Motion for Summary Judgment of Edwin D. Steel, Jr., guardian *ad litem* for Joseph Donner Winsor, Donner Hanson and Curtin Winsor, Jr. filed November 18, 1954, (2) the Motion for Summary Judgment of Wilmington Trust Company filed June 21, 1955, and (3) the Motion for Summary Judgment of Dora Stewart Lewis, Mary Washington Stewart Borie and Paula Browning Denckla filed July 22, 1955; and the Court having considered the pleadings and exhibits, affidavits, depositions, certified copies of the Florida proceedings and other documents filed in support of and in opposition to said motions for summary judgment; briefs having been filed and the Court having heard oral argument; and the Court having found that there is no genuine issue as to any material fact and having concluded that

Edwin D. Steel, Jr., guardian *ad litem* for Joseph Donner Winsor, Donner Hanson and Curtin Winsor, Jr., and Wilmington Trust Company are entitled to judgment as a matter of law; and the Court having filed its Opinion dated December 28, 1955;

And it appearing that prior to the entry of said Order of reference of July 19, 1955, several other motions had been filed and were pending, to-wit:

Motion of Defendants Dora Stewart Lewis, Mary Washington Stewart Borie and Paula Browning Denckla to Dismiss filed September 27, 1954;

Motion of Wilmington Trust Company and Delaware Trust Company filed February 17, 1955 for default judgment under Rule 55(b);

Motion of Robert B. Walls, Jr., guardian *ad litem* of Dorothy B. R. Stewart filed February 18, 1955 to strike motion of Wilmington Trust Company and Delaware Trust Company for default judgment;

Motion of Defendants Dora Stewart Lewis, Mary Washington Stewart Borie and Paula Browning Denckla filed February 23, 1955 to strike motion of Wilmington Trust Company and Delaware Trust Company for default judgment;

and it appearing that subsequent to the entry of said Order of Reference of July 19, 1955 several additional motions, a counterclaim and two cross claims were filed, to-wit:

[fol. 205] Counterclaim of defendants Dora Stewart Lewis, Mary Washington Stewart Borie and Paula Browning Denckla against Elizabeth Donner Hanson, Executrix and Trustee, etc. filed July 22, 1955;

Cross claim of defendants Dora Stewart Lewis, Mary Washington Stewart Borie and Paula Browning Denckla against Wilmington Trust Company and Delaware Trust Company filed July 22, 1955;

Motion of Edwin D. Steel, Jr., guardian *ad litem* as aforesaid filed September 22, 1955 for default judgment pursuant to Rule 55(b);

Motion of Robert B. Walls, Jr., guardian *ad litem* of Dorothy B. R. Stewart filed September 22, 1955 to strike motion of Edwin D. Steel, Jr., guardian *ad litem* as aforesaid, for default judgment; and

Motion of defendants Dora Stewart Lewis, Mary Washington Stewart Borie and Paula Browning Denckla filed September 27, 1955 to strike motion of Edwin D. Steel, Jr., guardian *ad litem* as aforesaid for default judgment;

and it appearing to the Court that the disposition of all of said additional motions, the counterclaim and two cross claims is now appropriate because of the disposition of said three motions for summary judgment made by Paragraphs (1) and (2) of this Order;

IT IS ORDERED, ADJUDGED AND DECREED

(1) That the Motion to Dismiss filed September 27, 1954 and the Motion for Summary Judgment filed July 22, 1955 by defendants Dora Stewart Lewis, Mary Washington Stewart Borie and Paula Browning Denckla be and the same hereby are denied;

[fol. 206] (2) That the Motion for Summary Judgment of Edwin D. Steel, Jr., guardian *ad litem* for Joseph Donner Winsor, Donner Hanson and Curtin Winsor, Jr. filed November 18, 1954 and the Motion for Summary Judgment of Wilmington Trust Company filed June 21, 1955 be and the same hereby are granted, and in accordance with said motions and the prayers of the complaint it is expressly adjudged, declared and determined:

(a) That by virtue of the Agreement of March 25, 1935 between Dora Browning Donner and Wilmington Trust Company, a copy of which is attached as Exhibit B to the Complaint filed herein, there was created a valid trust under the laws of the State of Delaware;

(b) The execution and delivery by Dora Browning Donner (sometimes referred to as Dora E. Donner) to the Wilmington Trust Company of the document dated December 3, 1949 (Complaint Exhibit C), and the execution and delivery by Dora Browning Donner to the Wilmington Trust Company of the document dated July 7, 1950, (Complaint Exhibit D), constituted valid and effective exercises of the power of appointment reserved to Dora Browning Donner under the agreement dated March 25, 1935, between Dora Browning Donner and Wilmington Trust Company (Complaint Exhibit B).

(c) The payments referred to in paragraph 15 of complaint made by Wilmington Trust Company, Trustee under the agreement dated March 25, 1935 between Dora Browning Donner and Wilmington Trust Company, to Delaware Trust Company, Trustee under Trusts No. 9022 and 9023, in accordance with paragraph 2(a) of the instrument dated December 3, 1949 (confirmed by paragraph 2 of the instrument dated July 7, 1950) were valid and proper payments and constituted a lawful discharge of Wilmington Trust Company's duty as Trustee under said Agreement of March 25, 1935.

(d) In addition to the payments specified in the preceding subparagraph (c) each and every other distribution made by defendant Wilmington Trust Company of property held by it pursuant to said Agreement of March 25, 1935 between Dora Browning Donner and Wilmington Trust Company as set forth in Paragraph 15 of the Complaint were valid and proper distributions and constituted a lawful discharge of Wilmington Trust Company's duty as Trustee under said Agreement of March 25, 1935.

(3) All parties to this litigation are forever bound by the declarations, adjudications and determinations contained in subparagraphs (a), (b), (c) and (d) of Paragraph (2) hereof.

(4) That the counterclaim of defendants Dora Stewart Lewis, Mary Washington Stewart Borie and Paula Browning Denckle against Elizabeth Donner Hanson, as Executrix and Trustee under the last Will and Testament of

3.

Respondents admit that they did not appear in said action in the Court of Chancery in Delaware, and they allege that they are not bound by said Delaware decree. They deny that the daughters of Katherine N. R. Denckla and Dorothy [fol. 230] B. Stewart are claiming through or in privity with their mothers.

4.

Respondents admit that the opinion mentioned in paragraph 4 of said motion to remand was written by the Chancellor in Delaware but allege that it was written more than eleven months after the final decree was entered in the Florida chancery court. Furthermore, said opinion in Delaware is not a sound legal opinion as will be shown in the brief presented for filing herewith.

5.

Respondents admit the issuance of the judgment by the Chancery Court of Delaware on January 13, 1955, but allege that they are not bound by the same as it was entered more than twelve months after the Florida Chancery decree; that the full faith and credit clause of the Constitution of the United States required the Chancery Court in Delaware to recognize the prior Florida Chancery decree which is now on appeal in this case, having been appealed by said movants, and now set for oral argument on March 27, 1956, in the Supreme Court of Florida. Said Delaware Chancery decree is not a sound decree, as the Chancellor in Delaware overlooked certain principles of law which would have prevented the entry of such decree if they had been considered, as will be shown in the brief presented herewith.

6.

Respondents admit the allegations contained in paragraph 6 of the complaint, but allege that the order therein mentioned is not binding on the courts in Florida for the reasons set forth in the brief presented for filing herewith.

Respondents admit the allegations contained in the first paragraph of paragraph number 7 of said motion to remand.

As to the allegations contained in the second paragraph of paragraph 7, respondents deny that the said Elizabeth Donner Hanson, individually or otherwise, is bound by the judgment in the Chancery Court of Delaware and allege that she was enjoined by the Chancellor in Palm Beach County, Florida, from proceeding in any manner with said chancery case in Delaware which she had filed (R. 72) as executrix and as trustee under the will of Dora Browning Donner. Now, she alleges that said chancery case in Delaware has proceeded to judgment and that the Florida courts are bound thereby, despite the injunction of the Florida courts.

Although it has been more than two months since said Delaware judgment or decree was entered on January 13, 1956, appellants have waited until eight days before the date set for the argument of their appeal in the Supreme Court of Florida to serve their motion to remand this case to the lower court for dismissal, but respondents are replying promptly so there will be no delay in the hearing before the Supreme Court of Florida. Respondents allege that said motion to remand is but another step in the inordinate delays appellants have occasioned in this case by various motions, petitions for certiorari, and other delaying tactics, which they have pursued in order to try to deprive the courts of Florida of jurisdiction, while they attempted to get a decision in their favor in Delaware so [fol. 232] as to plead the full faith and credit clause of the Constitution of the United States.

Dora Browning Donner was a citizen of Florida, at the time of her death, and her estate is being administered under her will in the Florida courts in Palm Beach County by her daughter, Elizabeth Donner Hanson, movant herein, who is also a Florida resident and who has been personally served in this case and has appeared herein, both individually and as executrix.

Nearly six months after the appellees, as legatees under the will, had filed suit against movant and all other inter-

ested parties known to them, and after she had lost her first petition for certiorari before the Supreme Court of Florida in this case, she filed in Delaware a complaint for declaratory decree (R. 72) which has the earmarks of an attempt to lose the case in Delaware so as to try to deprive the courts of Florida of jurisdiction. Said complaint did not point out the relation between the will and the trust instrument and did not point out to the Delaware Court that the trust instrument provides that if the power of appointment was invalid, the trust assets passed under the will, now on probate in Palm Beach County, Florida. The Chancellor in Delaware overlooked this important principle in his opinion and in his judgment.

As explained in the brief of appellees; beginning on page 5; this case originated by complaint for declaratory decree, filed by the appellees in Palm Beach County, Florida, on January 22, 1954 (R. 1). The appellants, as defendants in the lower court, filed a motion to dismiss, which [fol. 233] the Honorable C. E. Chillingworth, Circuit Judge, denied on April 9, 1954. The defendants then filed a petition for certiorari in the Supreme Court of Florida wherein they raised the identical grounds for reversal which they have raised in their appeal from the final decree. The petition for certiorari was promptly denied by the Supreme Court of Florida, and the mandate of the Supreme Court was filed in the lower court on July 1, 1954.

The defendants, appellants herein, thereafter filed an answer (R. 63), on August 3, 1954, and they also filed a motion to stay further proceedings in the Circuit Court of Palm Beach County, Florida (R. 83). They alleged that Elizabeth Donner Hanson, as executrix and trustee under said will, had just filed a similar complaint for declaratory decree in Delaware on July 28, 1954; this complaint was filed in Delaware after the mandate from the Supreme Court of Florida had been filed in the lower court. As this was patently an attempt to deprive the Florida courts of jurisdiction to pass on the questions involved in this case, the plaintiffs, appellees herein, filed an application for injunction (R. 85) in the lower court, in Palm Beach County, on August 16, 1954, to enjoin the appellants from proceeding further with the Delaware case.

The Honorable Jos. S. White issued an injunctive order on August 25, 1954, (R. 118). The appellants, as defendants in the lower court, sought a review of said injunctive order by a second petition for certiorari in the Supreme Court [fol. 234] of Florida raising the same legal questions as were raised in the first petition for certiorari and as are now raised for the third time by their assignments of error on this appeal (R. 150). This second petition for certiorari was denied by the Supreme Court on November 23, 1954 (R. 121).

Upon the filing of the mandate on said second petition for certiorari, in the lower court, the plaintiffs, appellees herein, filed a motion for summary final decree (R. 119), and after a hearing thereon, the Honorable C. E. Chillingworth, on January 14, 1955, entered the summary final decree (R. 138) from which the present appeal was taken (R. 148).

The defendants, appellants herein, filed a petition for rehearing on February 1, 1955, seeking to set aside this final decree, and said petition was denied by Judge Chillingworth on March 3, 1955 (R. 148). All these delays by the defendants, appellants herein, were apparently designed to delay the Florida case until they could get a decree in the Chancery Court in Delaware. The case in Delaware was filed by Elizabeth Donner Hanson, as executrix and trustee under the last will of Dora Browning Donner, deceased; she is a defendant in the Florida case and the plaintiff in the Delaware case. Said injunctive order enjoined her from proceeding with said complaint for declaratory decree in Delaware. Despite this injunctive order of the lower court and while this appeal has been pending in the lower court in Florida, she disobeyed said injunctive order and in August, 1955, called up her case in Delaware for hearing.

[fol. 235] Whereupon, appellee filed a petition in the Circuit Court of Palm Beach County, Florida, to have her adjudged in contempt of court for disobeying said injunctive order. The Honorable Jos. S. White, Judge of said court, issued a rule to show cause and after hearing, adjudged her to be in contempt of court, on September 12, 1955, but gave her the opportunity of purging herself of

such contempt by withdrawing her motion for summary judgment in the Delaware case until termination of this Florida case, "or until further order of court". No further order was obtained, and no appeal was taken to the Supreme Court of Florida from said contempt order. On the contrary, she purged herself of such contempt by filing her withdrawal of her motion for summary judgment in the Delaware court. A certified copy of the contempt proceedings and orders above mentioned are tendered for filing with this response.

Despite said injunctive order and her apparent obedience of it, the said Elizabeth Donner Hanson, as said executrix and as trustee for her two children, has permitted said Delaware litigation which she filed, to continue to final decree and now in her "motion to remand", filed in the Supreme Court of Florida, she alleges in paragraph 7 thereof "that she is bound by the judgment of the Court of Chancery of the State of Delaware" and that she will "be bound by the determination of the Supreme Court of Delaware on appeal, said courts having jurisdiction of the trust assets". Such contentions and her actions in defiance of said injunctive order amount to trifling with the courts and judicial processes of the Sovereign State of [fol. 236] Florida.

She is a Florida citizen, acting as the executrix of the will of a Florida citizen, now in probate in the County Judge's Court in and for Palm Beach County, Florida. In paragraph 7 of her motion to remand, she seeks to cloud the issue by claiming that the trust assets are located in Delaware, but she fails to reveal that this Florida proceeding is not for the purpose of recovering said assets, but for the purpose of determining what passes under this Florida will. After this has been determined by the courts of Florida, proper suit will be filed to recover said trust assets or their value, but she is trying to preclude the Florida courts by getting the Delaware courts to determine whether the trust assets pass under the Florida will.

Wherefore, respondents pray that said motion to remand be denied.

Motion of Respondents to Dismiss "Motion to Remand"

The appellees move to dismiss the motion to remand on the following grounds:

(a) Said motion to remand shows by its own allegations that the Delaware declaratory decree in chancery was entered twelve months after the Florida declaratory decree in chancery was entered; that both courts are of similar jurisdiction, and that, therefore, the full faith and credit clause of the Constitution of the United States requires the Delaware courts to give full recognition to the Florida decree.

[fol. 237] (b) The record in this case shows that said motion to remand is seeking to deprive the Florida courts of jurisdiction of a matter over which the Delaware courts have no jurisdiction—the administration of an estate of a Florida citizen in Florida and the determination of what passes under her will.

(c) All property involved in this case is personal property and its situs for administration and for passing under the will of said deceased is in Florida.

Wherefore, respondents pray that this motion to dismiss be sustained.

C. Robert Burns, Redfearn & Ferrell, By /s/ D. H. Redfearn, Attorneys for Respondents.

[fol. 239] IN THE SUPREME COURT OF FLORIDA
JUNE TERM, A. D. 1956, SPECIAL DIVISION A.

Case No. 27,622

ELIZABETH DONNER HANSON, individually and as executrix,
et al., Appellants,

v.

KATHERINE N. R. DENCKLA, individually, et al., Appellees.

An Appeal from the Circuit Court for Palm Beach County,
C. E. Chillingworth, Judge.

Caldwell, Pacetti, Robinson & Foster and Manley P. Caldwell for Elizabeth Donner Hanson, Individually, as Execu-

trix of the Will of Dora Browning Donner, Deceased, as Guardian Ad Litem for Joseph Donner Winsor and Donner Hanson and William Donner Roosevelt, Individually; McCarthy, Lane & Adams, Edward McCarthy and William H. Foulk (Wilmington, Delaware) for Elizabeth Donner Hanson as Guardian Ad Litem for Joseph Donner Winsor and Donner Hanson, Appellants.

C. Robert Burns and Redfearn & Ferrell, for Appellees.

OPINION—Filed September 19, 1956.

HOBSON, J.:

This is an appeal by defendants from a summary final decree holding that assets of a trust created by Dora Donner during her lifetime passed under her will. Cross-assignments of error have been filed by the plaintiffs, who contend that the chancellor erred in holding that he had no jurisdiction over some of the defendants, the trustee and certain beneficiaries under the trust; who did not answer the complaint.

The essential facts of the case are not in dispute. Dora Donner died in Palm Beach, Florida, on November 20, 1952, leaving a will dated December 3, 1949, which was probated in Palm Beach County. She was formerly a citizen of Pennsylvania, but made her permanent home in Palm Beach County on or about January 15, 1944, and remained domiciled in Florida until she died.

[fol. 240] On March 25, 1935, the testatrix executed a trust instrument in which she named the Wilmington Trust Company, a Delaware corporation, as trustee. The trust instrument provided in part as follows:

"Trustee shall pay over the net income of the trust fund unto Trustor, for and during the term of her natural life. Upon the death of Trustor Trustee shall assign, transfer, convey and deliver this trust fund, principal and undistributed income thereof, if any, free from this trust, unto such person or persons and in such manner and amounts and upon such trusts, terms and conditions as Trustor shall have appointed by the last instrument in writing which she shall have

executed and delivered to Trustee, or failing such instrument, by her last Will and Testament, or in default of any such appointment then unto the then living issue of Trustor, per stirpes and not per capita."

The trust assets consisted entirely of intangible personalty.

On April 6, 1935, Mrs. Donner executed a power of appointment under the terms of the trust. On October 11, 1939, she executed a new power of appointment, amending the previous power.

On December 3, 1949 (the same day she executed her will, and while domiciled in Florida), Mrs. Donner executed an instrument entitled "Donner * First Power of Appointment" wherein she revoked all previous exercises of the power of appointment under the trust and ordered that certain sums be paid to a different set of beneficiaries.

On July 7, 1950, she executed an instrument entitled "Donner * Second Power of Appointment" amending the instrument of December 3, 1949. This was the last "power of appointment" the testatrix exercised before her death.

In her will, after making certain specific directions and bequests, the testatrix provided ~~the~~ part as follows:

[fol. 241] "FIFTH: All the rest, residue and remainder of my estate, real personal and mixed, whatsoever and wheresoever the same may be at the time of my death, *including any and all property, rights and interest over which I may have power of appointment which prior to my death has not been effectively exercised by me* or has been exercised by me in favor of my Executrix, I direct my Executrix to deal with as follows, namely:—"

[Here follow certain directions and the names of residuary legatees, plaintiff-appellees here.] (Italics supplied.)

The complaint for declaratory decree in this case was filed for the purpose of determining what passes under the residuary clause of the will quoted above. This determination, of course, requires a study of the trust agreement of March 25, 1935, and the powers of appointment exercised

thereunder, to determine whether or not such powers as the testatrix had were "effectively exercised" under the terms of the will. On this issue, the chancellor held in part:

"Concerning the declaration of trust dated March 25, 1935, and particularly the power of appointment dated December 3, 1949, no present interest passed to any beneficiary other than the Trustor (Testatrix). It seems clear to me, from the authorities, that the power of appointment was testamentary in character and did not constitute a valid inter vivos trust appointment. As the appointment had only one subscribing witness, rather than two, as required in Florida, it did not constitute a valid testamentary disposition. Hence, the executrix should receive the assets and dispose of them agreeable to the will under which she was appointed."

[fol. 242] After this final decree was entered, a suit which had been brought in Delaware by Elizabeth Donner Hanson, as executrix and trustee under the Donner will (one of the appellants herein) to determine the validity of the trust agreement resulted in a summary judgment of the Court of Chancery of the State of Delaware in and for New Castle County, holding that the trust was valid. An appeal from this judgment is pending in Delaware but, so far as the record here before us shows, has not yet been determined.

Appellants have lodged with us a copy of the Delaware chancellor's opinion and judgment and, on the basis thereof, have moved to remand the instant case with directions to dismiss it, taking the position that the Delaware judgment is dispositive of the main issue raised on this appeal. We shall first consider the contention of appellants that the circuit court of Palm Beach County erred in holding the trust and the powers of appointment exercised thereunder invalid as testamentary in character. As a preliminary inquiry, it is necessary to determine whether or not jurisdiction existed in the courts of Florida to pass upon the validity of these instruments.

There can be no doubt that the court below possessed substantive jurisdiction to determine this issue. Jurisdiction existed by virtue of the will, which had been duly probated in Florida, the testatrix' domiciliary state. Reference having been made in the will, as we have seen, to powers of appointment, and the question of effective exercise thereof having been properly raised, the chancellor below had no alternative but to examine the trust instrument and documents executed thereunder and declare them valid or invalid. This is to be distinguished from a case wherein questions of administration or validity of a purported inter vivos trust arise absent a will or any reference therein. Cf. *Wilmington Trust Co. v. Wilmington Trust Co.*, Del., 24 A. 2d 309, wherein the settlor had executed a will "making no reference whatever to the power of appointment conferred on him by the [previously executed] trust agreement . . ." and it was held that the Delaware courts had jurisdiction to determine the validity of [fol. 243] trust powers, although the settlor died a domiciliary of another state. In the case now presented, it would have been an abdication or abandonment of jurisdiction, which we would have been obliged to correct, if the chancellor below had failed to answer the question which was duly brought before him for adjudication.

The next question is the source of the applicable law to test the validity of the attempted trust disposition. The trustee, Wilmington Trust Company, is a Delaware corporation with its principal place of business in Delaware. Securities representing the intangible personalty which forms the corpus of the trust are also located in Delaware. The settlor was domiciled in Pennsylvania when she executed the original trust instrument. The first two "powers of appointment", now revoked, were executed while the settlor was domiciled in Pennsylvania. But these considerations alone are insufficient to persuade us that the law of either Delaware or Pennsylvania is applicable, for reasons which will hereinafter appear.

Assuming, for the moment, that this was an inter vivos trust, the only exercises of the power of appointment which could have been intended to create an interest to be enjoyed at the settlor's death were those reflected in the docu-

ments of 1949 and 1950. The settlor obviously intended these documents, if any, to make the controlling disposition, for she revoked all previous exercises of the power and even called the 1949 and 1950 papers the "first" and "second" power of appointment respectively, although she had previously executed similar instruments. The chancellor in Delaware, in expressing his opinion that the trust was valid under Delaware law, sanctioned payment to the remaindermen named in these last two powers of appointment. In the last analysis we, too, are concerned with the interests of these remaindermen in our inquiry as to whether or not the instruments which created their interests were effective to shift the trust property out of the estate of the testatrix. We do not question the validity of the beneficial life estate reserved by the settlor.

[fol. 244] It is urged upon us that the remaindermen possessed during the life of the settlor a present right of future enjoyment of the trust property. In making this argument, appellants state in part in their brief that:

"... since the right to amend is specifically reserved in the Trust Agreement of March 25, 1935, *each appointment should be construed as an amendment to and a republication of the original agreement*. Therefore, the trust agreement and appointments thereunder must always be construed together." (Italics supplied.)

In *Henderson v. Usher*, 118 Fla. 688, 160 So. 9, we observed that an inter vivos trust usually has its situs at the residence of the creator of the trust, and we were considerably influenced in our consideration of this principle by the case of *Swetland v. Swetland*, 105 N. J. Eq. 608, 149 A. 50; *Id.*, 107 N. J. Eq. 504, 153 A. 907, which we viewed as "one of the leading cases in this country on the question". In the *Swetland* case the settlor had amended the trust, but had been domiciled in New Jersey both at the time of his execution of the original trust agreement and the amendment thereto. It was held that New Jersey law applied to test both agreements. The court in the *Swetland* case rejected the contention that the applicable law as to the trust necessarily followed the settlor wherever he might be domiciled after the trust was executed, and it is

unnecessary for us to express any opinion regarding this principle. It is sufficient to observe that in the instant case the last effective acts, if any there were, of the settlor to establish remainder interests under the trust were accomplished while she was a Florida domiciliary, and we consider the last powers of appointment as a republication of the original trust instrument, or as if the trust instrument had been executed while the settlor was domiciled in Florida. We consider this a far more realistic interpretation of these instruments than if we were to rule that the last powers of appointment should be construed to relate back to the date upon which the original [fol. 245] trust agreement was executed, because the effect of a "relation-back" view would be to establish an artificially early date for interests which were obviously not intended to be created by the settlor until much later. Hence we must consider the validity of the trust, and the remainder interests it sought to create, under Florida law, *Henderson v. Usher, supra*, 118 Fla. 688, 160 So. 9. Compare the rule sustaining the power of the domiciliary state to tax, and apply its tax law to, the exercise of a power to dispose of intangibles, although the trust fund and trustee are outside the state. *Graves v. Schmidlapp*, 315 U. S. 657, 86 L. Ed. 1097; *Bullen v. Wisconsin*, 240 U. S. 625, 60 L. Ed. 830.

The logic of the foregoing analysis is strongly buttressed in the instant case by the fact that the settlor chose, after she had come to Florida, which was to be her last domicile, to make an integrated pattern of arrangements for the disposition of her property. At this period of her life she desired to make final exercise of whatever powers she might have had under the earlier arrangement but was careful to provide in her will for the possible ineffectiveness of such exercise of power, making an unquestionably valid testamentary disposition to settle her entire estate if the doubtful powers of appointment failed.

Having decided that Florida law applies, we are next obliged to apply it. The validity of an attempted inter vivos trust such as this is a matter of first impression in this state. The trust instrument provided, as we have seen, that the settlor would receive all of the net income for life.

The settlor reserved to herself the right to amend or revoke the trust agreement in whole or in part at any time. Many powers of the trustee could ordinarily be exercised by it only upon the written direction of, or with the written consent of, the "adviser" of the trust. These powers were the following:

"(b) To sell at public or private sale, exchange for like or unlike property, convey, lease for terms longer or shorter than the trust, and otherwise dispose [fol. 246] of any or all property, real or personal, held in the trust fund, for such price and upon such terms and credits as Trustee may deem proper.

"(c) To invest the proceeds of any such sale or sales, and any other money available for investment, in such stocks, bonds, notes, securities and/or other income producing property as may be deemed appropriate for this trust fund, irrespective of the rules of investment applying to trustees under any present or future laws of the State of Delaware or elsewhere.

"(e) To participate in any plan or proceeding for protecting or enforcing any right, obligation or interest arising from any stock, bond, note or security held in the trust fund, or for reorganizing, consolidating, merging or adjusting the finances of any corporation issuing the same, to accept in lieu thereof any new or substituted stocks, bonds and/or securities, to pay any assessment or any expense incident thereto, and to do any other act or thing that Trustee may deem necessary or advisable in connection therewith."

As "adviser" the settlor named her husband or "such other person or persons as trustor may nominate in writing delivered to trustee during her lifetime". Finally, and very significantly, the settlor reserved to herself the power of appointment, which we have discussed above, with a view to naming beneficiaries to take remainder interests in the trust after her death.

Although any of these reservations of power in the settlor, standing alone, might not have been enough to

render the trust invalid (cf. *Williams v. Collier*, 120 Fla. 248, 162 So. 868, wherein we upheld a revocable trust reserving a life interest to the settlor, with remainder payable to named grandchildren). the cumulative effect of [fol. 247] the reservations was such that the relationship established divested the settlor of virtually none of her day-to-day control over the property or the power to dispose of it on her death, and the trust was illusory. See *Burns v. Turnbull*, 294 N. Y. 889, 62 N. E. 2d 785; *In re Tunnell's Estate*, 325 Pa. 554, 190 A. 906; *In re Shapley*, 353 Pa. 499, 46 A. 2d 227; *Hurley's Estate*, 17 Pa. D. & C. 637; *Warsco v. Oshkosh Savings & Trust Co.*, 183 Wis. 156, 196 N. W. 829; *Steinke v. Sztanka*, 364 Ill. 334, 4 N. E. 2d 472. In Scott, Trusts and the Statute of Wills, 43 Harv. L. R. 521, 529, the author states:

"Suppose that the settlor reserves not merely a life interest and a power to revoke the trust in whole or in part and to modify the trust, but reserves also a power to control the trustee in the administration of the trust. In such a case, there is authority to the effect that the trust is in substance testamentary and is invalid unless declared in an instrument executed in accordance with the requirements of the Statute of Wills."

Another common principle is reflected in Restatement of Trusts, Sec. 56, which reads as follows:

"Where the owner of property purports to create a trust inter vivos but no interest passes to the beneficiary before the death of the settlor, the intended trust is a testamentary trust and is invalid unless the requirements of the statutes relating to the validity of wills are complied with."

Appellants contend that Illustration 8 under Subsection g. of this section is "exactly our case". This illustration reads as follows:

"8. A transfers certain securities to B in trust to pay the income to A for life and upon A's death to convey the securities to such person as may be designated in

a letter to be delivered by A to B on the following [fol. 248] day. On the following day A delivers a letter to B designating C as the person entitled to receive the securities on A's death. A valid trust for C is created, since an interest passes to C during the life of A."

The above illustration represents the instant trust in some particulars, but is an oversimplification of the facts before us. It relates to a single exercise of a power of appointment, rather than frequently revoked and amended exercises of power, such as appear in the case before us, which would demonstrate that the settlor considered the appointments to be ambulatory in nature and exactly like successive wills or codicils in their operation. The illustration given, moreover, does not consider the element of control, which we have discussed above. This is treated in Sec. 57 of the Restatement, Subsection g. of which reads in part as follows:

"If the settlor reserves a beneficial life estate and power to revoke or modify the trust and such power to control the trustee as to the details of the administration of the trust that the trustee is his agent, the intended disposition so far as it is intended to take effect after his death is invalid unless the requirements of the Statute of Wills are complied with, but the intended trust is valid so far as the beneficial life estate of the settlor is concerned."

Illustration 5 reads as follows:

"5. A, the owner of shares of stock, delivers the certificates to the B Trust Company to hold and deal with as custodian, to receive the income and pay it over to A, and with power to sell the shares and to reinvest the proceeds. In order to carry out these purposes the shares are registered in the name of the trust company. A writes a letter to the trust company directing it to convey the shares on A's death to C, [fol. 249] unless A should otherwise direct. A dies. The intended disposition in favor of C is testamentary,

and C is not entitled to the shares unless the requirements of the Statute of Wills are complied with."

True it is that in the situation posed in Illustration 5 the action taken by A, the settlor, is somewhat less formal than the action taken by the settlor herein, and while this is a circumstance which would tend to uphold the validity of the instant trust, we do not consider it controlling when weighed against the multiple reservations of power we have discussed.

We reemphasize that we do not, and need not, hold that the reservation of the power of appointment, or any other factor standing alone, would suffice to invalidate the remainder interests sought to be created under this trust. It is enough to observe that if, as to the remaindermen, this trust is not invalid as an agency agreement, and testamentary as the court below found, it is difficult to understand what further control could be retained by a settlor to produce this result, and the principles to which we have alluded above would lose their meaning. We have been shown no error in the chancellor's ruling on this aspect of the case, which accordingly must be affirmed.

We next consider the contention made on the cross-appeal that the chancellor erred in ruling that he lacked jurisdiction over the persons of certain absent defendants, summoned to appear by constructive service of process. These defendants were the trustee and persons who would benefit under the last power of appointment executed under the trust, and against the will. In *Henderson v. Usher*, supra, 160 So. 9, we upheld constructive service of a citizen of New York, although the trust "res", consisting entirely of intangible personalty, was physically located in New York, and the trust was administered there by the Chase National Bank of New York, as trustee. We held that constructive service was valid in that state of the record because substantive jurisdiction existed in the Florida court by virtue of construction of a will, which was also involved, the testator having been domiciled in Florida. We observed that it was not essential that the [fol. 250] assets of the trust be physically in this state in order that constructive service be binding upon a non-

Dora Browning Donner, deceased, filed July 22, 1955, be and the same hereby is dismissed with prejudice.

(5) That the cross-claims of defendants Dora Stewart Lewis, Mary Washington Stewart Borie and Paula Browning Denckla against Delaware Trust Company and Wilmington Trust Company filed July 22, 1955 be and the same hereby are dismissed with prejudice.

(6) That pursuant to Rule 55(b) and in accordance with [fol. 208] the motion of Edwin D. Steel, Jr., guardian *ad litem* as aforesaid, filed September 22, 1955 and with the motion of Wilmington Trust Company and Delaware Trust Company filed February 17, 1955, judgment by default with respect to all matters, property rights and interests, legal and equitable, decreed, adjudicated and determined by Paragraph (2) (including subparagraphs (a), (b), (c) and (d) thereof) and by Paragraph (3) of this Judgment is granted against the following named defendants for the reason that they have failed to appear and answer the complaint herein on or before September 10, 1954, pursuant to the orders of the Court herein entered on July 29, 1954 and August 12, 1954 and have not appeared or answered up to this time:

Katherine N. R. Denckla
Hobe Sound, Florida

Elwyn L. Middleton, Guardian of the property of
Dorothy B. R. Stewart, a mentally ill person,
Harvey Building
West Palm Beach, Florida

Bryn Mawr Hospital
Bryn Mawr, Pennsylvania

Miriam V. Moyer
1710 Fidelity-Philadelphia Bldg.
Philadelphia, Pa.

James Smith
221 Williams Street
Rosemont, Pa.

Walter Hamilton
Rosemont, Pa.

[fol. 209] Dorothy A. Doyle
5108 Penn Street
Philadelphia 24, Pa.

Ruth Brenner
4224 Osage Avenue
Philadelphia 4, Pa.

Mary Glackens
4930 Westminster Avenue
Philadelphia 31, Pa.

Louisville Trust Company, as Trustee for Benedict H.
Hanson and as Trustee under Agreements with Wil-
liam H. Donner,
Louisville, Kentucky

Benedict H. Hanson
510 Park Avenue
New York, New York

William Donner Roosevelt
2540 South Ocean Boulevard
Palm Beach, Florida

John Stewart
Beechwood Road
Rosemont, Pa.

(7) That (1) the Motion of Robert B. Walls, Jr., guardian *ad litem* of Dorothy B. R. Stewart, filed February 18, 1955, to strike motions of Wilmington Trust Company and Delaware Trust Company for default judgment under Rule 55(b), (2) the Motion of Dora Stewart Lewis, Mary Washington Stewart Borie and Paula Browning Denckla filed February 23, 1955 to strike motion of Wilmington Trust Company and Delaware Trust Company for default judgment under Rule 55(b), (3) the Motion of Robert B. Walls, Jr., guardian *ad litem* of Dorothy B. R. Stewart filed September 22, 1955 to strike motion of Edwin D. Steel, Jr., guardian *ad litem* as aforesaid, for default judgment under Rule 55(b), and (4) the Motion of Dora Stewart Lewis, Mary Washington Stewart Borie and Paula Browning [fol. 210] Denckla filed September 27, 1955 to strike Motion

of Edwin D. Steel, Jr., guardian *ad litem* as aforesaid, for default judgment under Rule 55(b), be and the same hereby are respectively denied.

(8) That upon application of any interested party this Court will determine what counsel fees, expenses and disbursements shall be allowed out of any *res* before this Court, and jurisdiction is hereby reserved for that purpose.

/s/ D. L. Herrmann
Acting Vice Chancellor
pursuant to Order of Chancellor
entered herein on July 19, 1955.

APPROVED AS TO FORM:

Attorneys for Plaintiff

/s/ C. S. Layton
Attorney for Wilmington
Trust Company

/s/ David F. Anderson
Attorney for Delaware
Trust Company

/s/ Edwin L. Steel, Jr.
Guardian *ad litem* for
Joseph Donner Winsor,
Curtin Winsor, Jr.
and Donner Hanson.

Guardian *ad litem* for
Dorothy B. R. Stewart
and William Donner Denckla

Attorney for Dora Stewart
Lewis, Mary Washington
Stewart Borie and Paula
Browning Denckla.

[fol. 211] STATE OF DELAWARE,
KENT COUNTY, ss.:

I, T. E. Townsend, Jr., Clerk of the Supreme Court of the State of Delaware, do hereby certify that the foregoing is a true and correct copy of Item #69 in the Record in the cause

Dora Stewart Lewis, et al., :

v.

: No. 3, 1956.

Elizabeth Donner Hanson :

as the same remains on file and of record in said Court.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Court at Dover this 6th day of March, A.D. 1956.

/s/ T. E. Townsend, Jr.
Clerk of the Supreme Court.

(Seal)

[fol. 212] EXHIBIT C TO MOTION TO REMAND

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

Civil Action No. 531

ELIZABETH DONNER HANSON, as Executrix and Trustee
under the Last Will of Dora Browning Donner, deceased,
Plaintiff,

v.

WILMINGTON TRUST COMPANY, a Delaware corporation,
as Trustee, et al., Defendants.

NOTICE

TO: DAVID F. ANDERSON, ESQUIRE,
Attorney for Defendant,
Delaware Trust Company, Trustee,
948 Delaware Trust Building
Wilmington, Delaware;

CALEB S. LAYTON, ESQUIRE,
Attorney for Defendant,
Wilmington Trust Company, Trustee
4072 duPont Building
Wilmington, Delaware;

ROBERT B. WALLS, ESQUIRE,
Guardian ad litem for Dorothy
B.R. Stewart and William
Donner Denckla,
500 Industrial Trust Building
Wilmington, Delaware;

EDWIN D. STEEL, JR., ESQUIRE,
Guardian ad litem for Joseph
Donner Winsor, Curtin Winsor,
Jr. and Donner Hanson,
3108 duPont Building
Wilmington, Delaware;

WILLIAM H. FOULK, ESQUIRE,
WILLIAM DUFFY, JR., ESQUIRE,
Attorneys for Plaintiff,
228 Delaware Trust Building
Wilmington, Delaware;

[fol. 213] PLEASE TAKE NOTICE that the attached Motion of Defendants, Dora Stewart Lewis, Mary Washington Stewart Borie and Paula Browning Denckla, for a new trial will be brought on to be heard before the acting Vice-Chancellor of the State of Delaware, the Honorable Daniel L. Herrmann, in his chambers at eleven o'clock in the forenoon, on Monday, January 23, 1956, or at such other time as may be convenient to the Court.

/s/ ARTHUR G. LOGAN
Arthur G. Logan

Dated: January 19, 1956.

/s/ AUBREY B. LANK

Aubrey B. Lank

Attorneys for Defendants,

Dora Stewart Lewis, Mary Washington

Stewart Borie and Paula Browning

Denckla,

400 Continental American Building,

Wilmington, Delaware.

[fol. 214] IN THE COURT OF CHANCERY OF THE STATE OF
DELAWARE IN AND FOR NEW CASTLE COUNTY

Civil Action No. 531

ELIZABETH DONNER HANSON, as Executrix and Trustee
under the Last Will of Dora Browning Donner, deceased,
Plaintiff,

v.

WILMINGTON TRUST COMPANY, a Delaware corporation,
as Trustee, et al., Defendants.

MOTION FOR NEW TRIAL

Come now, Dora Stewart Lewis, Mary Washington Stewart Borie and Paula Browning Denckla, by and through their attorneys, Arthur G. Logan and Aubrey B. Lank, and pursuant to Rule 59 of the Rules of the Court of Chancery of the State of Delaware move this Court for a new trial and as grounds therefor say:

1. That this Court has failed to give full faith and credit to a judgment of the Circuit Court of Palm Beach County, Florida, known as "Katherine N. R. Denckla, individually et al., Plaintiffs, vs. Wilmington Trust Company, a Delaware corporation, et al., Defendants" in Chancery number 31,980, dated January 14, 1955, in ac-

cordance with Article 4, Section 1 of the Constitution of the United States.

[fol. 215] 2. That this Court erred as a matter of law in holding that any present interest passed to the beneficiaries under the Agreement of March 25, 1935, between Dora Browning Donner and Wilmington Trust Company, and the powers of appointment purportedly executed in conformity therewith.

3. That this Court erred as a matter of law in finding that the doctrine of collateral estoppel does not apply against all the appearing parties to this action.

4. That this Court erred as a matter of fact and law in holding the Agreement of March 25, 1935 a valid trust agreement when both in fact and law said Agreement was and is an agency agreement by reason of the controls retained by the alleged settlor or trustor, Dora Browning Donner, and by reason of the controls which she reserved through the so called advisor to this alleged trust.

5. That this Court erred as a matter of fact in holding that the relationship between the so called settlor or trustor, Dora Browning Donner, and her first advisor was not an existing agency at the time of the execution of the Agreement on March 25, 1935, in that the affidavit of C. Kenneth Baxter dated December 27, 1954, shows that he was, prior to and on March 25, 1935, an investment advisor to William Hanson Donner and members of his family, which included Dora Browning Donner, and companies [fol. 216] owned or controlled by them.

6. That this Court erred as a matter of law in granting the Defendants, Wilmington Trust Company, Delaware Trust Company and Edwin D. Steel, Jr., Esquire, guardian ad litem for Joseph Donner Winsor, Curtin Winsor, Jr. and Donner Hanson, Motions for Summary Judgment in that there is a factual dispute as to whether an agency existed between Dora Browning Donner and the first settlor and whether it continued after the alleged trust was entered into on March 25, 1935.

7. That this Court erred as a matter of law in holding that a settlor or trustor must consent to any surrender

of duties between a trustee and an advisor pertaining to the operation of the trust, whereas here the advisor and trustee were both the agents of the settlor.

8. That this Court erred as a matter of law in holding that the alleged trustor intended to create a valid trust on March 25, 1935, as such intent must be read from the trust instrument itself and such intent is lacking in the alleged trust agreement of March 25, 1935.

/s/ ARTHUR C. LOGAN

Arthur G. Logan

/s/ AUBREY B. LANK

Aubrey B. Lank

Attorneys for Defendants,

Dora Stewart Lewis, Mary Washington
Stewart Borie and Paula Browning
Denckla,

400 Continental American Building,
Wilmington, Delaware.

Dated: January 19, 1956.

[fol. 217] STATE OF DELAWARE,
KENT COUNTY, ss.:

I, T. E. Townsend, Jr., Clerk of the Supreme Court of the State of Delaware, do hereby certify that the foregoing is a true and correct copy of Item #70 of the Record in the cause

Dora Stewart Lewis, et al., :

v. : No. 8, 1956

Elizabeth Donner Hanson :

as the same remains on file and of record in said Court.

IN TESTIMONY WHEREOF, I have hereunto set
my hand and affixed the seal of said Court
at Dover this 6th day of March, A.D. 1956.

/s/ T. E. Townsend, Jr.
Clerk of the Supreme Court.

(Seal)

[fol. 218] EXHIBIT D TO MOTION TO REMAND

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY
Civil Action No. 531

ELIZABETH DONNER HANSON, as Executrix and Trustee
under the Last Will of Dora Browning Donner, deceased,
Plaintiff,

VS.

WILMINGTON TRUST COMPANY, a Delaware corporation,
as Trustee, et al., Defendants.

ORDER

AND NOW, TO WIT: this 25th day of January, A.D. 1956,
the Motion of Dora Stewart Lewis, Mary Washington
Stewart Borie and Paula Browning Denckla, For New
Trial pursuant to Rule 59 of the Rules of the Court of
Chancery of the State of Delaware, filed herein on January
20, 1956, having come on to be heard, it is

ORDERED, ADJUDGED and DECREED that the said Motion
For New Trial filed herein by Dora Stewart Lewis, Mary
Washington Stewart Borie and Paula Browning Denckla,
be and the same hereby is denied.

/s/ D. L. Herrmann
Judge

[fol. 219] APPROVED AS TO FORM:

/s/ David F. Anderson
Attorney for Defendant,
Delaware Trust Company, Trustee.

/s/ C. S. Layton
Attorney for Defendant,
Wilmington Trust Company, Trustee.

/s/ R. B. Walls, Jr.
Guardian ad litem for Dorothy B. R.
Stewart and William Donner Denckla.

/s/ E. D. Steel, Jr.

Guardian ad litem for Joseph Donner
Winsor, Curtin Winsor, Jr. and
Donner Hanson.

Attorney for Plaintiff.

/s/ Arthur G. Logan

Attorney for Dora Stewart Lewis,
Mary Washington Stewart Borie and
Paula Browning Denckla.

[fol. 220]

STATE OF DELAWARE,
KENT COUNTY, ss.:

I, T. E. Townsend, Jr., Clerk of the Supreme Court of
the State of Delaware, do hereby certify that the fore-
going is a true and correct copy of Item #71 of the
Record in the cause

Dora Stewart Lewis, et al., :

v. : No. 8, 1956

Elizabeth Donner Hanson. :

as the same remains on file and of record in said Court.

IN TESTIMONY WHEREOF, I have hereunto set
my hand and affixed the seal of said Court
at Dover this 6th day of March, A.D. 1956.

/s/ T. E. Townsend, Jr.
Clerk of the Supreme Court.

(Seal)

[fol. 221] EXHIBIT E TO MOTION TO REMAND

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

No. 8, 1956.

Appeal from the Court of Chancery of the State of Delaware in and for New Castle County, Civil Action No. 531.

PRAECIPE

DORA STEWART LEWIS, MARY WASHINGTON STEWART BORIE
and PAULA BROWNING DENCKLA,

Defendants Below, Appellants,

vs.

ELIZABETH DONNER HANSON, as Executrix and Trustee under
the Last Will of Dora Browning Donner, deceased,
Plaintiff Below, Appellee,

WILMINGTON TRUST COMPANY, a Delaware corporation, as
Trustee under three separate Agreements, (1) and (2)
with William H. Donner dated March 18, 1932 and March
19, 1932, and (3) with Dora Browning Donner dated
March 25, 1935,

Defendant Below, Appellee,

DELAWARE TRUST COMPANY, a Delaware corporation, as
Trustee under three separate Agreements, (1) with Wil-
liam H. Donner dated August 6, 1940, and (2) and (3)
with Elizabeth Donner Hanson, both dated November 26,
1948,

Defendant Below, Appellee,

KATHERINE N. R. DENCKLA,

Defendant Below, Appellee,

ROBERT B. WALLS, ESQUIRE, Guardian ad litem for Dorothy
B. R. Stewart and William Donner Denckla,

Defendant Below, Appellee,

[fol. 222] ELWYN L. MIDDLETON, Guardian of the property
of Dorothy B. R. Stewart, a mentally ill person,
Defendant Below, Appellee,

EDWIN D. STEEL, JR., ESQUIRE, Guardian ad litem for Joseph
Donner Winsor, Curtin Winsor Jr., and Donner Hanson,
Defendant Below, Appellee,

BRYN MAWR HOSPITAL, a Pennsylvania corporation, MIRIAM
V. MOYER, JAMES SMITH, WALTER HAMILTON, DOROTHY A.
DOYLE, RUTH BRENNER and MARY GLACKENS,
Defendants Below, Appellees,

LOUISVILLE TRUST COMPANY, a Kentucky corporation, as
Trustee for Benedict H. Hanson, and as Trustee under
agreements with William H. Donner,
Defendant Below, Appellee,

WILLIAM DONNER ROSSEVELT, JOHN STEWART and BENEDICT
H. HANSON,
Defendants Below, Appellees,

To:

T. EDGAR TOWNSEND

Clerk of the Supreme Court of the State of Delaware
Dover, Delaware:

Dora Stewart Lewis, Mary Washington Stewart Borie
and Paula Browning Denckla, Defendants Below, Appel-
lants, hereby appeal from all of the Judgment of the Court
of Chancery of the State of Delaware in and for New Castle
County dated the 13th day of January, A.D. 1956, and also
appeal from all of the Order of said Court dated the 25th
[fol. 223] day of January, A.D. 1956, denying the motion of
these appellants for a new trial, both of which were entered
in Civil Action Number 531 and hereby direct you to issue
writs, to be served either personally or by registered mail,
viz., (1) a writ (to be called the citation) directing the ap-
pellees to defend the cause, and (2) a writ (to be called the
writ of error), directed to the clerk of the court below, re-

quiring the return to the Supreme Court of the State of Delaware of the record of the cause below. There are set forth below the names and addresses of the attorneys of record for the appellees who have appeared by attorneys and the last known post office address of such appellees who have no attorney of record.

William H. Foulk, Esquire,
William Duffy, Jr., Esquire,
Attorneys for Plaintiff,
Elizabeth Donner Hanson,
228 Delaware Trust Building
Wilmington, Delaware;

Caleb S. Layton, Esquire,
Attorney for Defendant,
Wilmington Trust Company, Trustee,
4072 duPont Building
Wilmington, Delaware;

David F. Anderson, Esquire,
Attorney for Defendant,
Delaware Trust Company, Trustee,
948 Delaware Trust Building
Wilmington, Delaware;

Robert B. Walls, Esquire,
Guardian ad litem for Dorothy
B. R. Stewart and William Donner Denckla,
500 Industrial Trust Building,
Wilmington, Delaware;

[fol. 224] Edwin D. Steel, Jr., Esquire,
Guardian ad litem for Joseph Donner Winsor,
Curtin Winsor, Jr., and Donner Hanson,
3108 duPont Building
Wilmington, Delaware;

Katherine N. R. Denckla
Hobe Sound
Florida

Elwyn L. Middleton, Esquire,
Guardian of the property of
Dorothy B. R. Stewart, a mentally ill person,
Harvey Building
Post Office Box 1391
West Palm Beach, Florida;

Bryn Mawr Hospital
Bryn Mawr, Pennsylvania;

Miriam V. Moyer
1710 Fidelity-Philadelphia Bldg.
Philadelphia, Pennsylvania;

James Smith
221 Williams Street
Rosemont, Pennsylvania;

Walter Hamilton
Rosemont, Pennsylvania;

Dorothy A. Doyle
5108 Penn Street
Philadelphia 24, Pennsylvania;

Ruth Brenner
4224 Osage Avenue
Philadelphia 4, Pennsylvania

Mary Glackens
4930 Westminster Avenue
Philadelphia 31, Pennsylvania

Louisville Trust Company,
Trustee for Benedict H. Hanson,
and Trusted under agreements
with William H. Donner,
Louisville, Kentucky;

[fol. 225] William Donner Roosevelt
2540 South Ocean Blvd.
Palm Beach, Florida;

John Stewart
Beechwood Road
Rosemont, Pennsylvania;

Benedict H. Hanson
510 Park Avenue
New York City, New York.

Dated: February 14, 1956.

/s/ Arthur G. Logan
Arthur G. Logan

/s/ Aubrey B. Lank
Aubrey B. Lank

Attorneys for Dora Stewart Lewis,
Mary Washington Stewart Borie and
Paula Browning Denckla, Defendants
Below, Appellants,
400 Continental American Building
Wilmington, Delaware.

[fol. 226] STATE OF DELAWARE,
KENT COUNTY, ss.:

I, T. E. Townsend, Jr., Clerk of the Supreme Court of
the State of Delaware, do hereby certify that the foregoing
is a true and correct copy of Praecept in the cause

Dora Stewart Lewis, et al., :

v. : No. 8, 1956

Elizabeth Donner Hanson :

as the same remains on file and of record in said Court.

IN TESTIMONY WHEREOF, I have hereunto set
my hand and affixed the seal of said Court
at Dover this 6th day of March, A.D. 1956.

/s/ T. E. Townsend, Jr.
Clerk of the Supreme Court.

(Seal)

[fol. 228] IN THE SUPREME COURT OF THE STATE OF FLORIDA

[Title omitted]

RESPONSE OF APPELLEES TO APPELLANTS' "MOTION TO REMAND"; MOTION OF APPELLEES TO DISMISS SAID "MOTION TO REMAND"—Filed March 27, 1956.

Said motion to remand, in paragraph 7 thereof, refers to movant as "petitioner" and also as "appellants". Movants thus recognize that their motion to remand is a petition raising issues of both fact and law. For this reason appellees present this response and motion to dismiss for filing, and ask the court to consider the same as part of the record in this case.

1.

Respondents admit the allegations contained in paragraph 1 of said motion to remand.

2.

[fol. 229] Respondents admit the allegations contained in paragraph 2 of said motion to remand but allege that the complaint for declaratory decree mentioned therein, filed in Delaware, was filed approximately six months after the complaint for declaratory decree was filed in Florida on January 22, 1954. Elizabeth Donner Hanson, as executrix and as trustee under the will of Dora Browning Donner, deceased, filed said complaint in Delaware only after she had lost her first petition for certiorari in this case in Florida. Respondents allege that said proceeding in Delaware was merely a sham and was filed by the movant herein in order to try to deprive the Florida courts of jurisdiction and for the purpose of trying to lose said case in Delaware and then claim in the Florida courts that she could not recover said trust assets. If she can lose the case in Delaware and win the case in Florida, then her two children will get the benefits of most of said trust assets instead of the appellants (R 39). This illustrates the inconsistent position which she occupies in this case, and why she is not an impartial executrix and trustee and why she could not have initiated the Delaware case in good faith.

resident where the problem presented to the court was to adjudicate, inter alia, the status of the securities incorporated in the trust estate and the rights of the non-resident therein. It is entirely consistent with the *Henderson* case to hold, as we do, that the court below erred in ruling that it lacked jurisdiction over the persons of the absent defendants. With this view of the case, we need not consider the contention of cross-appellees that the absent defendants are necessary parties under *Martinez v. Balbin*, Fla., 76 So. 2d 488.

Finally, we mention again the motion to remand on the basis of the decree of the Delaware court. Since we hold that we have jurisdiction of the matter presented, and that Florida law is exclusively applicable thereto, this motion must be denied.

Affirmed in part; reversed in part.

Terrell, Acting Chief Justice, Thornal and O'Connell, JJ., Concur.

[fol. 252] IN THE SUPREME COURT OF FLORIDA

[Title omitted]

PETITION FOR EXTENSION OF TIME TO FILE PETITION FOR REHEARING—Filed September 28, 1956

Come now appellants, by their undersigned counsel, and petition the Court to extend the time within which they may file a petition for rehearing, 15 days, to October 19, 1956; and as grounds would show the court that, after all counsel for appellants had delegated to an associate the preparation of such petition, and the necessary preliminary research, such associate became ill, and in view of the involved questions of Constitutional Law, Full Faith and Credit, Conflicts and Jurisdiction, if possible at all, it would be possible only with undue personal inconvenience, or default on other commitments, for appellants' counsel now to review the authorities, complete and file such petition within the 15-day period allowed by Rule 45.

And your petitioners will ever pray.

Caldwell, Pacetti, Robinson & Foster, /s/ Manley P. Caldwell, 501 Harvey Building, West Palm Beach, Florida.

[fol. 253] /s/ William H. Foulk, 228 Delaware Trust Building, Wilmington, Delaware.

McCarthy, Lane & Adams, /s/ Edw. McCarthy, 423 Atlantic National Bank Bldg., Jacksonville 2, Florida.

Duly sworn to by Edward McCarthy, jurat omitted in printing.

CERTIFICATE OF SERVICE (omitted in printing).

[fol. 255] IN THE SUPREME COURT OF FLORIDA

[Title omitted]

ORDER EXTENDING TIME TO FILE PETITION FOR REHEARING—
September 28, 1956

Attorneys for appellants have filed a petition for extension of time beyond that allowed by the Rules of Court in which to file petition for rehearing in the above case and the same having been considered, it is ordered that appellants be and they are hereby allowed ten days additional time to that allowed by the Rules in which to file such petition.

[fol. 257] IN THE SUPREME COURT OF FLORIDA
SPECIAL DIVISION A.

[Title omitted]

PETITION FOR REHEARING—Filed October 13, 1956

Come now the Appellants, the answering defendants in the Circuit Court for Palm Beach County, by their undersigned attorneys, and petition the Court for rehearing and reconsideration of the decision rendered on September 19, 1956, upon the following grounds:

1. The Court erred in holding that the Circuit Court of Palm Beach County had jurisdiction over the persons of the non-appearing and non-answering defendants for the following reasons:

(a) Wilmington Trust Company, one of the non-appearing and non-answering defendants herein, was trustee of the assets which form the subject matter of this litigation until it transferred said assets to the persons entitled thereto under the power of appointment dated December 3, 1949. Delaware Trust Company was one of the recipients under said power. Defendants, Wilmington Trust Company and Delaware Trust Company, are cor- [fol. 258] porations organized and operating as trust companies under the laws of the State of Delaware; neither of said corporations has any place of business in the State of Florida; nor has either of them transacted any business in the State of Florida; nor does either of them have any officers or agents in the State of Florida; nor has either of them been served with process in the State of Florida or appeared in this litigation. Both of said trustees are necessary and indispensable parties to the final and effective determination of this litigation.

(b) None of the other recipients named in the appointment dated December 3, 1949 (other than Elizabeth Donner-Hanson, as Trustee under the Will of Dora Browning Donner) are residents of the State of Florida, nor has any of them been served personally with process in the State of Florida or appeared in this litigation. All of said parties are necessary and indispensable parties to the final and effective determination of this litigation.

(c) Three persons who qualified under the appointment dated December 3, 1949 (Dorothy Doyle, Mary Glackens and Ruth Brenner) were not even named as parties to the litigation; nor has any of them been served personally or otherwise; nor has any of them appeared in this litigation. These parties are also necessary and indispensable parties to the final and effective determination of this litigation.

(d) The assets which are the subject matter of this litigation are not now nor have they ever been in the State

of Florida nor have they been brought constructively into [fol. 259] the Courts of this State, and no legal basis exists for constructive service upon any of the non-appearing and non-answering defendants.

(e) Absent the parties and the trust res, the attempt at jurisdiction over the non-appearing, non-consenting and non-answering defendants violates the Fourteenth Amendment to the Constitution of the United States.

The Circuit Court's jurisdiction under the organic law of the State of Florida over the estate of the trustor, of matters of probate and the construction of her will where a patent ambiguity exists and over the executrix thereof does not confer jurisdiction to determine rights to assets held in trust in another jurisdiction and under the control of trustees who are not in this State. For example, the Circuit Court could not have jurisdiction to test the validity of a contract for the payment of money where the defendant lived outside of Florida merely because the amount recoverable under the contract was the subject of a specific legacy.

In *Findlay v. F. E. C. Railway Company* (D. C. Fla. 1933) 3 Fed. Sup. 393, Affirmed (CCA 5) 68 Fed. 2d 540, the Court held, contrary to the holding of this Court, that shares of stock of Florida corporations held by nonresident trustees under Mrs. Flagler's Will, which was probated in Florida, were not constructively within the State of Florida so as to authorize a decree in rem, and hence the Will could not be construed as to those shares. The Court stated:

"This Court is without power to construe the will, or to adjudicate by a decree in rem the rights, if any, of the railway company in the trust estate, as against these nonresident defendants, or against other nonresident beneficiaries under the will.

[fol. 260] "Even if the residual estate is an equitable asset of the railway company, and even if plaintiffs bonds, through the trust deed, are a lien upon it, there is no res in this jurisdiction, there is no basis upon which this court may properly direct the conduct of the nonresident trustees with respect to the trust

estate. Any attempt to do so would be a pure usurpation of power."

See also *Lines v. Lines* (Pa. 1891) 21 Atl. 809 holding that "a court of equity in this State (Pennsylvania) cannot by its decree take [property] out of the hands of its custodian there (New York) and transfer it to executors in this State." To the same effect see *Martin v. Martin* (Pa. 1906) 63 Atl. 1026; *Sadler v. Industrial Trust Co.* (Mass. 1951) 97 N.E. 2d 169 held:

" * * * The situs of the trust is in Rhode Island, where are found the trustee and the trust property, notwithstanding the residence of the beneficiaries in this Commonwealth [Citations omitted], and notwithstanding the former residence here of the settlor."

The case of *Henderson v. Usher* (1935), 118 Fla. 688, 160 So. 9, upon which this Court relies is inapposite. This Court after citing the *Lines* and *Martin* cases distinguished them by stating:

" * * * While here the trustees come into court seeking advice as to how they should proceed in the administration of the trust incident to its repudiation and election by the primary beneficiary to take a child's part. When they did this our view is that they constructively brought the res into the court." (Italics added.)

[fol. 261] This quotation conclusively demonstrates that the trustees in the *Henderson* case voluntarily submitted themselves to the jurisdiction of the Court by appearing. In our case the trustees did not appear and this court, therefore, cannot, under any theory, hold that the assets were constructively before it.

(f) The purported constructive service of process on all of the non-appearing and non-answering defendants whether under the provisions of Chapter 48, Florida Statutes, Section 48.01 and 48.02 or otherwise upheld by this Court contravenes the Constitution and Laws of the State of Florida and the Constitution of the United States,

in particular, Section 1 of the Fourteenth Amendment to the United States Constitution.

2. This Court in an effort to justify the jurisdiction of the Circuit Court, recognized the validity of the original trust (saying at page 5 of its opinion that it does not question the validity of the life estate in Mrs. Donner) and asserted that the situs of this valid trust was moved to this state, as the then domicile of Mrs. Donner, through her execution of the 1949 and 1950 appointments. This Court then concluded that the trust and the appointments, which formed the basis of the Circuit Court's jurisdiction, were invalid.

3. The Court erred in holding that Florida law, rather than Delaware law, was applicable in testing the validity of the trust for the following reasons:

(a) The law governing the validity of a trust is the law of the State of the situs of the trust and, in the case at bar, the situs of the trust is the State of Delaware. The [fol. 262] original trust agreement was executed in the State of Delaware; the trustor named a Delaware trustee; the trustor delivered the corpus of the trust to the trustee in the State of Delaware; and the trust has always been administered in the State of Delaware.

(b) This Court cannot support the validity of the trust for the purposes of applying Florida Law and then apply the same law to destroy the trust.

(c) In reaching the conclusion that Florida law applied, this Court erred in holding that republication is synonymous with "execution". "Republication" merely means "reaffirmation". The executions of said powers (as admitted by appellees and supported by the weight of authority) merely filled in the blanks of the original instrument. Furthermore, by the terms of the trust instrument, these powers only took effect when "delivered to the Trustee". Delivery was made to the Trustee in the State of Delaware and the situs of the trust could not thereby be moved from Delaware to Florida.

(d) The case of *Henderson v. Usher*, supra, is not applicable. There the trustees appeared, and the Court held

that, by so doing, they brought the assets constructively before the court.

(e) *Sweetland v. Sweetland*, 105 N.J. Eq. 608, 149 Atl. 50, upon which this Court relied in the *Henderson* decision and cited with apparent approval in this case has been repudiated by the New Jersey Court of Errors and Appeals in *Cutts v. Najdowski* (1938), 123 N. J. Eq. 481, 198 Atl. 885, which stated:

[fol. 263] "The creation of an inter vivos trust in moneys or securities is governed by the laws of the situs of the money or securities."

Restatement, Conflict of Laws, §299 states as follows:

"The administration of a trust of movables is supervised by the courts of that state only in which the administration of the trust is located."

This section makes it clear that the only Court which can supervise the administration and distribution of the trust assets is the State in which the administration is located. The only State in which the administration of the trust has been carried on is the State of Delaware.

(f) The failure of this Court to apply Delaware Law constitutes a denial of due process of law, in violation of the Fourteenth Amendment to the Constitution of the United States. *Home Life Insurance Company v. Dick*, (1930), 281 U. S. 297, 407, 408, 410; *Loucks v. Standard Oil Company*, 224 N. Y. 99, 120 N.E. 198, 202 (1918).

4. This Court erred in refusing to give full faith and credit to the decision of the Court of Chancery of the State of Delaware denominated *Hanson v. Wilmington Trust Co.*, (1956) 119 A. 2d 901, which held that the original trust agreement and the powers of appointment thereunder were valid and dispositive of the trust assets. This violates Article 4, Section 1, of the Constitution of the United States. The Delaware Court had jurisdiction over the trust assets and is the only Court which had jurisdiction to bind all persons having an interest in the trust property.

[fol. 264] 5. The decision of this Court is unenforceable in face of the mandate of the Delaware Court which is binding on all of the parties to this suit and upon those parties who are in possession of the funds which form the subject matter of this litigation.

In *Riley v. New York Trust Company*, 315 U. S. 343 (1942), the United States Supreme Court held that the Courts of the State of Delaware were not bound by a judgment of a Georgia Court in determining the domicile of the testatrix even though her husband, who was the principal claimant against the estate, had been a party to the Georgia proceeding. *New York Trust Company*, the administrator appointed in the State of New York, was not a party to the Georgia proceeding. The Court said:

"While the Georgia judgment is to have the same faith and credit in Delaware as it does in Georgia, that requirement does not give the Georgia judgment extra-territorial effect upon assets in other states. So far as the assets in Georgia are concerned the Georgia judgment of probate is *in rem*; so far as it affects personalty beyond the state, it is *in personam* and can bind only parties thereto or their privies. This is the result of the ruling in *Baker v. Baker, Eccles & Co.* 242 U. S. 394, 400. Phrased somewhat differently, if the effect of a probate decree in Georgia *in personam* was to bar a stranger to the decree from later asserting his rights, such a holding would deny procedural due process."

And in *Armstrong v. Armstrong* (April 9, 1956), 24 L. W. 4173, the Supreme Court of the United States considered a Florida decree rendered against a nonresident wife who was the defendant in a divorce action. The Florida Court, with only constructive service on the wife, purported to decree that she was not entitled to alimony and even directed that she return certain stock certificates located in Ohio. In a separate concurring opinion by Mr. Justice Black, with whom the Chief Justice and Justices Douglas and Clark joined, it was stated:

"We believe that Ohio was not compelled to give full faith and credit to the Florida decree denying alimony."

to Mrs. Armstrong. Our view is based on the absence of power in the Florida Court to render a personal judgment against Mrs. Armstrong depriving her of all right to alimony although she was a nonresident of Florida, had not been personally served with process in that State, and had not appeared as a party."

These decisions, applied to the case at bar, demonstrate that the Courts of this State have no power or jurisdiction to determine the validity of a Delaware trust or the exercise of powers of appointment thereunder when neither the trust res, the trustee nor the beneficiaries are subject to the jurisdiction of the Courts of this State and that the Courts of Delaware may determine the jurisdictional issue for themselves.

6. This Court erred in holding that the reservation of control by the trustor made the trust "illusory" and a mere agency agreement for the following reasons:

(a) ~~Interests in the trust assets vested in named beneficiaries during the lifetime of the trustor.~~

(b) The Trustor did not have the power to, or attempt to, control the trustee and/or the advisor of the trust in the administration of the trust.

Wherefore, appellants pray that this Court may grant reargument and reconsideration of this suit.

/s/ Manley P. Caldwell, Caldwell, Pacetti, Robinson & Foster, Attorneys for Elizabeth Donner Hanson, Individually and as Executrix, and William D. Roosevelt.

/s/ Edward McCarthy, Attorney for Elizabeth Donner Hanson, Guardian ad Litem.

/s/ W. H. Foulk, Of Counsel.

{fol. 266] CERTIFICATE OF SERVICE (omitted in printing).

[fol. 268] IN THE SUPREME COURT OF FLORIDA

[Title omitted]

MOTION TO STRIKE PETITION FOR REHEARING AND TO ORDER A
MANDATE SENT TO THE LOWER COURT WITHOUT DELAY—

Filed October 17, 1956

Now come the appellees in the above stated case and move to strike the petition for rehearing on the following grounds:

1.

In violation of Rule 45(2) of the Supreme Court, the petition for rehearing is in the form of another brief re-arguing the decisions, principles, and theories which have been argued by the appellants before the Supreme Court in two petitions for certiorari, and on the appeal in this case. No new principle of law is advocated, and no showing is made that the Supreme Court has overlooked any principle of law or fact which would change the outcome of this case.

2.

The allegations and argument on pages 4 and 5 of the petition for rehearing with reference to the case of Henderson v. Usher is specious and inapplicable to the case now before the court.

3.

There was never any trust created by Mrs. Donner except for her own life, and the Wilmington Trust Company and the Delaware Trust Company were never properly named as trustees for anyone except her. The alleged trust instrument and the powers of appointment all specifically provided that nothing was to vest in anyone until six months after her death. The trust instrument and the powers of [fol. 269] appointment thereunder are void, because they are testamentary and were not properly witnessed. The contention of the petitioners that the administration of a trust of movables is supervised by the courts of the state in which the administration of the trust is located, is not

applicable to the assets involved in this case, because no valid trust remainder was created.

4.

The contention on the last page of said petition for rehearing that the "interests in the trust assets vested in named beneficiaries during life of the trustor" is not applicable to this case, because no trust assets vested in any beneficiaries other than the life tenant, as the trust instrument and all powers of appointment thereunder were void because testamentary in form. The trust did not apply to anyone except Mrs. Donner, the trustor who retained only a beneficial life estate. She could revoke the trust at will; she could withdraw funds from the principal at will; she could and did change beneficiaries at will; the distribution of the trust assets was not to be made except after her death; the trustee could make no changes in an investment except on the direction or consent of the advisers specified in the trust instrument. The allegation at the bottom of page 9 of the petition for rehearing that "the trustor did not have the power to, or attempt to, control the trustee and/or the adviser of the trust in the administration of the trust" is not in accordance with the facts shown in the petition to remand, filed by the appellants in this case on the date of the argument on this appeal.

5.

The contention in said petition for rehearing that the Wilmington Trust Company and the Delaware Trust Company are necessary parties is without merit for the reasons set forth in the opinion of the Supreme Court in this case, and for the further reason that where a beneficiary of a trust is bound by a determination of a court, the trustee is likewise bound. These two trust companies are bound under the constructive service statutes as shown in appellees' original brief. Furthermore, the Wilmington Trust Company is not a necessary party, as it has no obligation except to pay the funds allegedly held in trust by it to the Delaware Trust Company for the benefit of either the appellants or [fol. 270] the appellees, whoever prevail in this case. The

Delaware Trust Company is merely the trustee to hold these assets for the benefit of whichever group prevails in this litigation. It is merely a stakeholder, and the real parties in interest are the beneficiaries, and as they are bound by the Florida decision, their trustee is also bound. See "Res Judicata", 65 Harvard Law Review, 818, 857; Union Trust Co. v. Stamford Trust Co. (Conn.) 43 Atl. 555.

Both the appellants and the appellees are parties in this case and they are bound by the decision of this court, and said trust companies, who are the real but hidden litigants in this case, are likewise bound.

62

Movants allege that said petition for rehearing should be stricken because it is patently an effort to delay this case while appellants seek to obtain a decision in Delaware in their favor so as to try to create a conflict in law, and thus further delay this matter by an appeal to the Supreme Court of the United States. The foundation for an appeal to the Supreme Court of the United States is again laid in this petition for rehearing, although it has been laid before in various petitions and pleadings which they have filed, and movants allege that such jurisdictional question is totally without merit.

Wherefore, movants pray that said petition for rehearing be stricken or dismissed promptly in order that there may be no further delay in this case, and in order that the mandate may be sent down without delay.

Redfearn & Ferrell, By /s/ C. Robert Burns, Attorneys for Movants, Appellees herein.

CERTIFICATE OF SERVICE (omitted in printing)

[fol. 272] IN THE SUPREME COURT OF FLORIDA

[Title omitted]

ORDER DENYING PETITION FOR REHEARING—
November 28, 1956

The petition for rehearing filed by the appellants in the above cause has been considered and said petition is denied.

[fol. 274] IN THE SUPREME COURT OF FLORIDA

[Title omitted]

PETITION FOR STAY OF MANDATE—Filed November 28, 1956

Come Now the Appellants, Elizabeth Donner Hanson, individually, as Executrix of the Will of Dora Browning Donner, Deceased, and as Guardian ad litem for Joseph Donner Winsor and Donner Hanson, and William Donner Roosevelt, individually, pursuant to Section 2101 (f) Title 28, U.S. Code, and petition this Honorable Court to stay the issuance of the mandate herein for a period of Ninety (90) days from the entry of the decree or order of this Court denying Appellants' petition for rehearing herein filed October 13, 1956, or for such other period of time as the Court shall deem to be a reasonable time, to enable Appellants to obtain a Writ of Certiorari from the United States Supreme Court, to review the final decree of this Honorable Court affirming or partly affirming the summary final decree of the Circuit Court for Palm Beach County, Florida, herein dated January 14, 1955; and Appellants [fol. 275] would respectfully show the Court that Appellants do intend in good faith to appeal to or petition said United States Supreme Court for such review.

And your petitioners will ever pray.

Caldwell, Pacetti, Robinson & Foster, By /s/ Manley
P. Caldwell, Harvey Building, West Palm Beach,
Florida, Attorneys for Appellants.

McCarthy, Lane & Adams, ~~by~~ /s/ Edw. McCarthy,
Atlantic National Bank Building, Jacksonville,
Florida, Attorneys for Elizabeth Donner Hanson
as Guardian ad litem for Joseph Donner Winsor
and Donner Hanson.

/s/ William H. Foulk, Delaware Trust Bldg., Wilmington,
Delaware, of Counsel:

*Duly sworn to by Edw. McCarthy, jurat omitted in
printing:*

[fol. 277] IN THE SUPREME COURT OF FLORIDA

[Title omitted]

ORDER GRANTING STAY OF MANDATE—November 28, 1956.

On application of the appellants it is ordered that execution and enforcement of the judgment of this Court rendered herein on September 19th, 1956, petition for rehearing of said cause having this day been denied, be stayed for ninety days from this date to enable the appellants to have a reasonable time in which to apply for and to obtain, if they can, a review of said cause by the Supreme Court of the United States and the mandate of this Court to the trial court be withheld for said ninety-day period and if review is perfected that the mandate be held pending disposition of the cause by the Supreme Court of the United States. This order is subject to cancellation at any time if the appellant fails to prosecute review by the Supreme Court of the United States with reasonable dispatch.

[fol. 279] IN THE SUPREME COURT OF FLORIDA
SPECIAL DIVISION A.

[Title omitted]

MOTION FOR LEAVE TO FILE EXTRAORDINARY PETITION FOR
REHEARING—Filed January 25, 1957

Come now the Appellants, some of the answering defendants in the Circuit Court of Palm Beach County, by their undersigned attorneys, and respectfully show unto the Court that, on January 14, 1957 the Supreme Court of Delaware affirmed the decision of the Court of Chancery of the State of Delaware in and for New Castle County, a copy of which Chancery Court decision was attached to and made a part of Appellants' motion to remand filed herein on March 19, 1956; that Appellants consider that it is of the utmost importance that this Court consider the opinion of the Supreme Court of Delaware before the final disposition of the cause in this Court; that in accordance with order entered herein on November 28, 1956, the mandate in this cause has not been transmitted to the Circuit Court of Palm Beach County, Florida, and this Court accordingly still has jurisdiction of this appeal.

Wherefore, Appellants respectfully move the Court to permit them to file an extraordinary petition for rehearing, said proposed petition with copy of said Delaware opinion [fol. 280] attached, being attached hereto, and made a part of this motion.

/s/ Caldwell, Pacetti, Robinson & Foster, /s/ Manley
P. Caldwell, Attorneys for Elizabeth Donner Hanson, Individually, as Executrix of the will of Dora Browning Donner, deceased, and as Guardian ad Litem for Joseph Donner Winsor and Donner Hanson, and William Donner Roosevelt, Individually, 501 Harvey Building, West Palm Beach, Florida.

/s/ Edward McCarthy, Attorney for Elizabeth Donner Hanson, as Guardian ad Litem as aforesaid, Atlantic National Bank Building, Jacksonville, Florida.

Of Counsel, /s/ William H. Foulk, 229 Delaware Trust Building, Wilmington, Delaware.

CERTIFICATE OF SERVICE (omitted in printing)

[fol. 281] ATTACHMENT TO MOTION FOR LEAVE TO FILE ETC.

IN THE SUPREME COURT OF FLORIDA, SPECIAL DIVISION A.

[Title omitted]

EXTRAORDINARY PETITION FOR REHEARING—Filed January 25, 1957

Come now the Appellants, some of the answering defendants in the Circuit Court of Palm Beach County, by their undersigned attorneys, and having attached hereto, as a part hereof, a certified copy of the opinion and judgment of the Supreme Court of Delaware, in the case of Elizabeth Donner Hanson, as Executrix and Trustee under the Last Will of Dora Browning Donner, deceased, v. Wilmington Trust Company, as Trustee, et al, C. A. No. 8, 1956, petition the Court for a rehearing and reconsideration of the decision rendered on September 19, 1956, and of the order denying Appellants' petition for a rehearing and reconsideration of said decision entered herein on November 28, 1956, upon the grounds set forth in Appellants' petition for rehearing and upon the further grounds that:

1. The decision and judgment of the Supreme Court of Delaware is entitled to full faith and credit in this action under the provisions of Article IV, Section 1 of the Constitution of the United States.

2. The decision and judgment of the Supreme Court of the State of Delaware is res adjudicata of the subject matter of this suit and is binding on all of the parties hereto.

[fol. 282] 3. The decision and judgment of this Court is enforceable in face of the decision and judgment of the Supreme Court of the State of Delaware.

Wherefore, Appellants pray that this Court vacate its order of November 28, 1956, denying Appellants' petition for rehearing and grant reargument and reconsideration of this suit.

/s/ Caldwell, Pacetti, Robinson & Foster, /s/ Manley P. Caldwell, Attorneys for Elizabeth Donner Hanson, Individually, as Executrix of the will of Dora Browning Donner, deceased, and as Guardian ad Litem for Joseph Donner Winsor and Donner Hanson, and William Donner Roosevelt, Individually, 501 Harvey Building, West Palm Beach, Florida.

/s/ Edward McCarthy, Attorney for Elizabeth Donner Hanson, as Guardian ad Litem as aforesaid, Atlantic National Bank Building, Jacksonville, Florida.

Of Counsel, /s/ William H. Foulk, 229 Delaware Trust Building, Wilmington, Delaware.

[fol. 283] ATTACHMENT TO EXTRAORDINARY
PETITION FOR REHEARING

No. 8, 1956

IN THE SUPREME COURT OF THE STATE OF DELAWARE

DORA STEWART LEWIS, MARY WASHINGTON STEWART BORIE
 and PAULA BROWNING DENCKLA, Defendants Below,
 Appellants,

v.

ELIZABETH DONNER HANSON, as Executrix and Trustee
 under the Last Will of Dora Browning Donner, deceased,
 Plaintiff Below, Appellee,

WILMINGTON TRUST COMPANY, a Delaware corporation, as
 Trustee under three separate Agreements, (1) and (2)
 with William H. Donner dated March 18, 1932 and March
 19, 1932, and (3) with Dora Browning Donner dated
 March 25, 1935, Defendant Below, Appellee,

DELAWARE TRUST COMPANY, a Delaware corporation, as
 Trustee under three separate Agreements (1) with Wil-
 liam H. Donner dated August 6, 1940, and (2) and (3)
 with Elizabeth Donner Hanson, both dated November
 26, 1948, Defendant Below, Appellee,

KATHERINE N. R. DENCKLA, Defendant Below, Appellee,

ROBERT B. WALLS, ESQUIRE, Guardian ad litem for Dorothy
 B. R. Stewart and William Donner Denckla, Defendant
 Below, Appellee,

ELWYN L. MIDDLETON, Guardian of the Property of Dorothy
 B. R. Stewart, a mentally ill person, Defendant Below,
 Appellee,

EDWIN D. STEEL, JR., ESQUIRE, Guardian ad litem for Joseph
 Donner Winsor, Curtin Winsor, Jr., and Donner Han-
 son, Defendant Below, Appellee,

BRYN MAWR HOSPITAL, a Pennsylvania corporation, MIRIAM
 V. MOYER, JAMES SMITH, WALTER HAMILTON, DOROTHY
 A. DOYLE, RUTH BRENNER and MARY GLACKENS, Defend-
 ants Below, Appellees,

LOUISVILLE TRUST COMPANY, a Kentucky corporation, as Trustee for Benedict H. Hanson, and as Trustee under agreements with William H. Donner, Defendant Below, Appellee,

WILLIAM DONNER ROOSEVELT, JOHN STEWART and BENEDICT H. HANSON, Defendants Below, Appellees.

[fol. 284] WOLCOTT and BRAMHALL, Justices, and CAREY, Judge, sitting.

Appeal from a judgment of the Court of Chancery of New Castle County.

Arthur G. Logan and Aubrey B. Lank, of Wilmington, for appellants.

Robert B. Walls, Jr., Guardian *ad litem* for Dorothy B. R. Stewart and William Donner Denckla, appellee *pro se*.

Caleb S. Layton, of Wilmington, for Wilmington Trust Company, appellee.

David F. Anderson, of Wilmington, for Delaware Trust Company, appellee.

Edwin D. Steel, Jr., Guardian *ad litem* for Joseph Donner Winsor, Curtin Winsor, Jr., and Donner Hanson, appellee *pro se*.

OPINION—January 14, 1957

WOLCOTT, J.:

This appeal involves two fundamental questions: (1) Whether a purported *inter vivos* trust and the exercise of a power of appointment under it are valid or invalid; and (2) Whether the parties may litigate the question of validity in a Delaware court because of an adverse adjudication upon the point by a Florida court.

The action below, commenced by Elizabeth Donner Hanson [fol. 285] son as the Florida executrix of the settlor's will and, also, in her capacity as trustee under the residuary clause of that will, seeks a declaratory judgment establishing the persons entitled to \$417,000 which was distributed

¹ Since its institution, she has been enjoined by the Florida court from prosecuting the action. Since that time, neither she nor her counsel has taken any part in the litigation.

by the *inter vivos* trustee pursuant to the exercise of the power of appointment.

The parties named as defendants in the action include Wilmington Trust Company, trustee under the trust agreement in question and, as such, the distributor of the \$417,000, Delaware Trust Company, trustee, the recipient of \$400,000 of the trust assets, the recipients of the balance of \$17,000, and all possible claimants of the trust corpus, either under the exercise of the power of appointment or under the settlor's Florida will.

The cause came up for decision below on four cross-motions for summary judgment. It will suffice to state that the defendants divide themselves into two contending groups. One group, which we will call the "Lewis Group", maintains that the trust agreement is invalid as an *inter vivos* trust instrument and that, accordingly, the exercise of the power of appointment was testamentary in character and, as such, ineffective under Florida law to pass any interest. The Lewis Group contends that the entire trust [fol. 286] corpus comprises part of the Florida estate of the settlor and passes under her will.

The second group, which we will call the "Hanson Group" maintains that the trust agreement is valid and that, accordingly, the transfer of \$417,000 pursuant to the exercise of the appointment is legally sufficient to pass title. Needless to say, the adoption of the contention of one group will benefit it financially to the loss of the other.

The Acting Vice Chancellor granted summary judgment in favor of the Hanson Group, holding that the trust agreement was a valid *inter vivos* trust; that the exercise of the power of appointment was effective to pass title to the \$417,000, and that there was no estoppel resulting from the Florida judgment. From this decision the Lewis Group appeals.

The facts are not in dispute. On March 25, 1935, Dora Browning Donner (hereafter Mrs. Donner), then being a resident of Pennsylvania, entered into a trust agreement with Wilmington Trust Company and deposited certain securities with it as the trust corpus. By the terms of the agreement Wilmington Trust Company was directed to manage, invest and reinvest the trust corpus and to pay

over the net income to Mrs. Donner for her life who reserved to herself a power of appointment of the corpus exercisable either by instrument or by will. Failing the exercise of the power, the agreement directed that the trust corpus be distributed by the trustee at her death to her issue surviving, or to her next of kin.

[fol. 287] Specific powers were conferred upon Wilmington Trust Company, as trustee, which in substance were the ordinary powers granted to a trustee. However, it was specified that Wilmington Trust Company could exercise certain of the powers "only upon the written direction of, or with the written consent" of a trust advisor. These powers were (1) to sell trust assets, (2) to invest proceeds of sale of trust property, and (3) to participate in mergers and reorganizations of corporations whose securities were held as part of the trust assets.

In the agreement, Mrs. Donner designated a trust advisor and reserved the right to nominate other advisors at any time during her lifetime. She also reserved the right to amend, alter or revoke the agreement in whole or in part at any time, as well as the right to change from time to time the trustee. On one occasion, she withdrew \$75,000 from the trust corpus, which sum she later replaced.

On two different occasions prior to 1949, Mrs. Donner executed instruments exercising the power of appointment. Finally, on December 3, 1949,² by a non-testamentary instrument, she exercised the power of appointment, specifically revoking the earlier exercises by her of the power, and directing the Wilmington Trust Company, six months after her death, to pay over a total of \$17,000 to Bryn Mawr [fol. 288] Hospital and certain family retainers; \$200,000 to Delaware Trust Company in trust for Joseph Donner Winsor, \$200,000 to Delaware Trust Company in trust for Donner Hanson, and the residue of the corpus to the executrix of her will.

In 1944, Mrs. Donner changed her residence from Pennsylvania to Palm Beach County, Florida where she was domiciled at her death in 1952. Her will was probated in Florida and Elizabeth Donner Hanson duly qualified as

² Later amended in a minor aspect.

executrix. The residuary clause of her will directed her executrix to pay from the residuary estate, which specifically included the balance of the trust corpus not appointed in her lifetime, all death taxes on property appointed from the trust corpus during her lifetime, and to divide the balance remaining into two equal parts, one part to be transferred to Delaware Trust Company in trust for Katherine N. R. Denckla, a daughter; and the other part to be transferred to Elizabeth Donner Hanson in trust for Dorothy B. R. Stewart, another daughter, for her life, and upon her death to Delaware Trust Company in trust for Katherine Denckla.

At the death of Mrs. Donner the trust corpus held by Wilmington Trust Company amounted to in excess of \$1,490,000. Thereafter, pursuant to the directions contained in the exercise of the power of appointment Wilmington Trust Company distributed assets in the aggregate amount of \$417,000 and transferred a portion of the balance of the corpus to the executrix of the will of Mrs. Donner.

[fol. 289] In January, 1954 the two residuary beneficiaries under the will of Mrs. Donner³ brought an action for declaratory judgment in Palm Beach County, Florida against Mrs. Hanson, individually and as executrix, Wilmington Trust Company, Delaware Trust Company, and some of the other possible claimants to the assets passing under the residuary clause of the will of Mrs. Donner.⁴ In this action a judgment was sought determining what property passed under the will of Mrs. Donner, and the authority of the executrix over the assets held by Wilmington Trust Company under the 1935 agreement.

Neither Wilmington Trust Company nor Delaware Trust Company were served personally in the Florida action, nor did either of them appear. None of the trust assets held by Wilmington Trust Company has ever been held or administered in Florida, nor has Wilmington Trust Company ever done business in the State of Florida.

³ Katherine Denckla appeared in her own person. Dorothy Stewart appeared by a guardian.

⁴ Some of the family retainers, the recipients of a total of \$17,000 from the distribution pursuant to the exercise of the power of appointment, were not named as parties.

On January 14, 1955 the Circuit Court of Palm Beach County, Florida entered a decree holding that it lacked [fol. 290] jurisdiction over the trust assets in Delaware and over Wilmington Trust Company, Delaware Trust Company and the other non-answering defendants, and directed that the complaint be dismissed without prejudice as to all of them. It was also held that no present interest passed to any beneficiary other than Mrs. Donner under the agreement of 1935 and that the exercise of the power of appointment by her was testamentary in character and, as such, invalid under Florida law because it was not subscribed by two witnesses. It was held, therefore, that the assets held by Wilmington Trust Company, passed under the will of Mrs. Donner, and that the distribution thereof was to be made in accordance with the residuary clause.

Thereafter, an appeal was taken to the Supreme Court of Florida by the equivalent of the Hanson Group seeking a reversal of the holding of invalidity of the 1935 trust and the exercise of the power of appointment. Similarly, the equivalent of the Lewis Group by cross-appeal sought a reversal of the holding of lack of jurisdiction over Wilmington Trust Company and Delaware Trust Company.

The Supreme Court of Florida handed down its opinion (not yet reported) affirming that portion of the decree adjudging the invalidity of the trust and the exercise of the power of appointment, and reversing that portion of the decree holding that Florida had no jurisdiction over Wilmington Trust Company and Delaware Trust Company.

[fol. 291] In the interim, while the appeal was pending in Florida, the Lewis Group perfected its appeal in this court from the judgment of the Acting Vice Chancellor and argued it before us.

In the argument and on the briefs, the main emphasis was placed by the Lewis Group upon the estopping effect of the Florida judgment. In deciding this appeal, however, we think a more logical approach to what has now become a headlong jurisdictional collision between states is to consider first the question of what law governs the basic

⁵ The Florida decree was entered after the instituting of suit in Delaware by the executrix.

validity of the trust agreement and the exercise of the power of appointment, and whether or not under the applicable law the instruments are legally effective as such. We therefore take up first the question of essential validity of the trust and the exercise of the power of appointment.

There is no dispute concerning the pertinent facts. Wilmington Trust Company at all times has done business in Delaware. The trust agreement was executed in Delaware. The assets comprising the trust corpus were delivered to Wilmington Trust Company and retained by it in Delaware. The trust was administered wholly within Delaware. At the time the agreement was executed, Mrs. Donner was a resident of Pennsylvania.

In determining the situs of a trust for the purpose of deciding what law is applicable to determine its validity, the most important facts to be considered are the intention [fol. 292] of the creator of the trust, the domicile of the trustee, and the place in which the trust is administered. *Wilmington Trust Co. v. Wilmington Trust Co.*, 26 Del. Ch. 396, 24 A. 2d 309; *Wilmington Trust Co. v. Sloane*, 30 Del. Ch. 103, 54 A. 2d 544; *Annotation* 89 A.L.R. 1033.

Generally speaking, a creator of an *inter vivos* trust has some right of choice in the selection of the jurisdiction, the law of which will govern the administration of the trust. *Wilmington Trust Co. v. Wilmington Trust Co.*, supra. This trust agreement was signed and the securities delivered to a trustee doing business in Delaware. We think that this circumstance clearly indicates the intent of Mrs. Donner to have the trust administered and governed according to the law of Delaware. 1 *Beale, The Conflict of Laws*, 599.

Formerly, some courts emphasized the domicile of the settlor in deciding what law governed, but the more recent trend of decisions has placed considerably more emphasis on the location of the trust property and its place of administration. *Land, Trust in the Conflict of Laws*, §23; 1A *Bogert, Trusts and Trustees*, §211, p. 327; *Restatement, Conflict of Laws*, §294(2). The manifest intention of Mrs. Donner to create a Delaware trust with a Delaware trustee, the deposit of the trust assets in Delaware, and the administration of the trust in Delaware, make it clear that the situs of the trust created by the agreement of 1935 is

[fol. 293] Delaware, and that, therefore, its law determines its validity.

Not only is it the rule that the essential validity of an inter vivos trust having its situs in Delaware is governed by its law, but it is equally the rule that the validity of the exercise of a power of appointment reserved in such a trust agreement is to be determined in accordance with Delaware law. *Wilmington Trust Co. v. Wilmington Trust Co.*, supra; *Equitable Trust Co. v. Snader*, 17 Del. Ch. 203, 151 A. 712; *Land, Trusts in the Conflict of Laws*, §24. This is so because the appointments made by the exercise of the power are regarded in law as though they had been embodied in the original trust instrument, and as such as having been created by it. *Wilmington Trust Co. v. Wilmington Trust Co.*, supra.

We, therefore, hold that the law of Delaware determines the essential validity of this trust agreement and of the exercise of the power of appointment.

We now reach the question of whether or not this particular trust instrument and the exercise of the power reserved in it are valid under Delaware law.

The Lewis Group first argues that the agreement of 1935 created no present interest in remainder, either vested or contingent, in anyone prior to the death of Mrs. Donner, and that, therefore, it was a testamentary disposition and, as such, invalid for failure to comply with the Florida statutes concerning wills. In support of the argument are cited 3 *Scott on Trusts*, §330.4; 4 *Bogert on Trusts and Trustees*, [fol. 294] §103; and *Restatement, Trusts*, §56. We recognize the rule but we think that it does not apply to the trust created by Mrs. Donner in 1935.

By that agreement Mrs. Donner reserved a life interest to herself, and directed that upon her death the corpus should be distributed as directed by the exercise of a reserved power of appointment. In the event she should die without having exercised the power it was directed that the corpus should be distributed to her then living issue, *per stirpes*, and in default of living issue, to her next of kin.

We think that a present interest in remainder came into existence with the creation of the trust in 1935. That remainder interest was lodged in Mrs. Donner's issue upon

condition they survived her. By the same token, Mrs. Donner's next of kin had an interest in remainder conditioned upon Mrs. Donner dying without leaving surviving issue. It is true that both of these remainder interests—whether vested or contingent makes no difference—were subject to defeasance by the exercise of the reserved power of appointment. That, however, does not mean that they were not present interests created in 1935. *Gray, The Rule Against Perpetuities*, (4th Ed.), §112(3); *Restatement, Property, Future Interests*, §157, comment R. Furthermore, the exercise of the power of appointment by Mrs. Donner by instrument in her lifetime created present interests in the beneficiaries of the appointment, and under the rule of *Wilmington Trust Co. v. Wilmington Trust Co.*, [Vol. 295] *supra*, those interests are regarded in law as having been embodied in the agreement of 1935. Accordingly, we are of the opinion that the trust is not testamentary in character for failure to create present interests in persons other than the settlor at the time it was created.

The Lewis Group next points to certain provisions of the trust agreement and contends that the effect of them is to destroy it as an effective *inter vivos* deed of trust. These provisions are: (1) The reservation by Mrs. Donner of all of the net income from the trust for her life; (2) The reservation by Mrs. Donner of the right to amend or revoke the trust agreement in whole or in part; (3) The reservation by Mrs. Donner of the right to change the trustee under the trust; (4) The reservation by Mrs. Donner of the right to designate and to change an investment advisor to the trustee; (5) The limitation placed upon the trustee to the effect that certain powers could be exercised only with the consent of or at the direction of the trust advisor, and (6) The reservation by Mrs. Donner of the power to appoint the trust corpus either by *inter vivos* instrument in writing, or by last will and testament.

The Lewis Group contends that cumulatively the above recited provisions have the legal effect of creating an agency relationship between Mrs. Donner and Wilmington Trust Company. It is, therefore, argued that since the relationship was one of agency, the disposition of the trust corpus by Mrs. Donner through the purported exercise of her re-

[fol. 296] served power of appointment was testamentary in character, and, as such, invalid under the law of Florida in which state she had died domiciled.

The Lewis Group cites authorities to the effect that if a settlor retains large powers of control over trust property and a power to change the ultimate beneficiaries of the trust to such an extent that the trust is made as ambulatory as a will, under some circumstances it will not be sustained as a trust, upon the theory that it is a disguised attempt by the settlor to make a revocable disposition of property to take effect after death. The question comes down to whether or not the combined effect of the reserved powers is such as to leave the settlor virtually the owner of the property and the trustee a mere agent. See *Annotation*, 32 ALR (2) 1270.

In Delaware it has long been the law that the reservation of a life interest in trust income coupled with a power to revoke the trust and to dispose of the trust corpus by testamentary appointment will not make the trust testamentary in character. *Equitable Trust v. Paschall*, 13 Del. Ch. 87, 115 A. 356. Nor will the reservation of a power to change the trustee at the option of the settlor make it testamentary. *Wilmington Trust Co. v. Wilmington Trust Co.*, supra.

[fol. 297] However, the main thrust of the argument of the Lewis Group is directed to the provisions of the agreement providing for the designation of a trust advisor and the limitations on the power of the trustee to act only with the consent of or at the direction of the advisor.

By the agreement, Mrs. Donner reserved the right to change the original advisor named and, in fact, she did so on two separate occasions. The agreement, however,

* This also seems to be the law in most jurisdictions. *United Bldg. & Loan Assn. v. Garrett* (1946, D.C. Ark.), 64 F.Supp. 460; *Rose v. Rose*, 300 Mich. 73, 1 N.W.2d 458; *Cleveland Tr. Co. v. White*, 134 Ohio State 1, 15 N.E.2d 627, 118 ALR 475; *Pickney v. City Bank Farmers Trust Co.*, 292 N.Y.S. 835; *Strause v. First Nat'l Bank of Ky.* (Ky.), 245 S.W.2d 914, 32 ALR 2d 126; *Leahy v. Old Colony Tr. Co.*, 326 Mass. 49, 93 N.E.2d 238, 18 ALR 2d 1006; *City Bank Farmers Tr. Co. v. Charity Organization Society*, 265 N.Y.S. 267; *Farkas v. Williams*, 5 Ill.2d 417, 125 N.E.2d 600. See 1 *Scott on Trusts*, §57.1.

specifically confines the powers of the trust advisor as limitations on the exercise of the trustee's powers to (1) the power to sell trust property; (2) the power to invest the proceeds of any sale of trust property, and (3) the power to participate in any plan of merger or reorganization of any company in which trust proceeds have been invested. With respect to the exercise of all of the other specific powers granted to the trustee the consent of the trust advisor is not required.

If it be assumed that the exercise by the trustee of the above enumerated powers had been conditioned solely upon the consent of Mrs. Donner herself, it is clear that that [fol. 298] limitation would not have made the trust testamentary in character: *Restatement of Trusts*, §57, Comment g; 1 *Scott on Trusts*, §57.2; 4 *Bogert on Trusts and Trustees*, §104; *National Shawmut Bank of Boston v. Loft*, 315 Mass. 457, 53 N.E. 2d 113. It follows logically, therefore, that if Mrs. Donner could have limited the power of the trustee to act only with her consent without making the trust testamentary, the same limitation could have been imposed by requiring the consent of a third party. In point of fact, the *National Shawmut Bank* case was precisely that situation, the power to control the investing of the trust funds having been conferred upon a third person. Furthermore, a trust advisor is a fiduciary, somewhat in the nature of a co-trustee, and is sometimes described as a quasi-trustee. *Gathright v. Gaut*, 276 Ky. 562, 124 S.W.2d 782; *Restatement of Trusts*, §185, Comment c; 2 *Scott on Trusts*, §185. The resulting situation fundamentally is not unlike the appointment of co-trustees whose joint action is required in trust matters.

The agreement of 1935 by its terms reserves no power to Mrs. Donner herself over the control or management of the trust property, except such power as may come from her right to revoke the trust, change the trustee and change the advisor to the trustee. As far as the terms of the agreement itself are concerned, the trustee and the advisor were required to use their independent judgment in reaching decisions relating to the administration of the trust.

[fol. 299] The terms of the agreement, therefore, do not compel the conclusion that Mrs. Donner retained such a measure of control over the management of the trust prop-

erty that, as a matter of law, the Wilmington Trust Company and the trust advisor named were actually her agents. The entire management of the trust is vested by the terms of the instrument in the trustee and the advisor. We think, therefore, that under the law of Delaware the agreement of 1935 created a valid *inter vivos* trust and not an agency relationship as the Lewis Group contends.

The Lewis Group, however, urges that the history of operation of the trust by Wilmington Trust Company indicates clearly that Wilmington Trust Company was in fact a mere agent. To support this contention, affidavits and depositions were filed upon the theory that the agreement, itself, was ambiguous, and that the history of operation of the trust would be of assistance in resolving the ambiguity.

Such extrinsic evidence is material only in the event of ambiguity in the trust instrument itself. *Restatement of Trusts*, §38. In our opinion, there is no ambiguity in this agreement. On the contrary, we think its provisions are clear with respect to the acts of Wilmington Trust Company which required the consent of the trust advisor. The scheme used in drafting the agreement was to enumerate specific powers granted to Wilmington Trust Company, as trustee. It was then specifically directed that certain, but not all, of [fol. 300] those powers should be exercised by Wilmington Trust Company only with the consent of or at the direction of the advisor of the trust. We think there is nothing ambiguous in this provision and that the requirement of consent of the trust advisor is confined to those specific powers. Consequently, we agree with the Acting Vice Chancellor that the evidence of the history of the trust administration is irrelevant.

In view, however, of the insistence of counsel upon the point, we also will consider it, but we point out that in our opinion such consideration is unnecessary, and probably improper in the absence of an ambiguity in the instrument.

Generally speaking, the evidence discloses that Mrs. Donner named successively three different trust advisors, and that in administering the trust Wilmington Trust Company acted almost entirely in accordance with the directions of the trust advisor. We will assume, as they appear to do, that the affidavits support the contention of the Lewis

Group that Wilmington Trust Company in all details of trust administration accepted unhesitatingly the directions of the advisor, and in fact exercised no independent judgment.

We have no doubt, however, that the voluntary giving up by a trustee of its independent functions as trustee to an advisor named in the trust instrument cannot operate to change the fundamental nature of the relationship created [fol. 301] by the agreement. Such a voluntary failure to act as an independent trustee in those fields in which the agreement contemplated such action may be ground at the insistence of a beneficiary to remove the trustee but, certainly, it cannot change the relationship intended to be created by the trustor.

We note, also, that none of the facts supports at all the contention that Mrs. Donner, herself, had a hand in the management of the trust or made any of the decisions with respect to the internal management of the trust. Indeed, as far as the facts indicate, she knew nothing of the manner in which Wilmington Trust Company and the trust advisor were managing the affairs of the trust.

Assuming, therefore, that the evidence was material, a conclusion we expressly disclaim, nevertheless, there is no showing that Mrs. Donner retained any practical control of the management of the trust estate to the extent that the trustee and the trust advisor were thereby created her agents, with the consequence that, in law, the agreement of 1935 and the exercise of the power of appointment created by it were testamentary in character.

Our conclusion, therefore, is that the agreement of 1935 under the law of Delaware created a valid *inter vivos* trust. Under the law of Delaware, also, we think Wilmington Trust Company was required to transfer the trust assets pursuant to the directions contained in Mrs. Donner's exercise of the power of appointment delivered to it prior to her death.

[fol. 302] The Lewis Group cites principally in support of its argument in this respect *In re Pengelly's Estate*, 374 Pa. 358, 97 A. 2d 844. The case, however, is of little aid to them. It was a suit brought by a widow, estranged from her husband for over forty years, to set aside a purported

inter vivos trust which excluded her from any share in the husband's assets. The purported trust agreement transferred certain securities in trust and granted the trustee the right to invest trust assets "with the approval of the settlor during his lifetime." By the agreement the settlor reserved the income for life, and disposed of the corpus after his death in a manner to exclude his widow.

The court, in its opinion, states the fact to be that the trust agreement was in effect nothing more than the continuance of an arrangement for the management of the settlor's affairs existing between the trustee and the settlor for a period of seven years prior to the execution of the agreement, and that that arrangement was one of principal and agent. Thus, *Pengelly's Estate* dealt with a purported trust which in reality perpetuated a previously existing principal and agent relationship. This relationship was unchanged and continued to be completely subjected to the actual directions of the settlor in its administration. As we have pointed out, in the case before us, however, Mrs. Donner exercised no actual control whatsoever. The two cases are clearly different.

[fol. 303] We have been furnished a certified copy of the opinion of the Supreme Court of Florida in the litigation between some of the parties to this appeal. Later, we will have occasion to refer to this opinion under the point of collateral estoppel, but in connection with the question now under discussion we regard it merely as an additional authority cited by the Lewis Group.

The Florida Supreme Court held that the law of Florida governed the question of validity of the exercise of the power of appointment, because Mrs. Donner was domiciled in Florida at the time of her death. As we have pointed out, however, the domicile of a settlor is at most a minor factor to be considered in determining the situs of an *inter vivos* trust. As we read the opinion it appears to be the theory of the Florida Court that each exercise of the power of appointment was an amendment and republication of the agreement of 1935, and since no present remainder interest was created either by the agreement, or the exercise of the power, until the death of Mrs. Donner domiciled in

Florida, the validity of those remainder interests was to be tested by Florida law.

With all deference to the highest tribunal of a sister state, we disagree. Such may be the law of Florida but it is certainly not the law of Delaware. As we have pointed out, the exercise of a power of appointment creates immediate interests which in law are as though they had been written into the original instrument. The right to revoke or change [fol. 304] the appointment has merely the effect of making the interests thereby created subject to possible defeasance. Furthermore, we think the Florida Supreme Court, in concluding that no present interests in remainder were created by the agreement of 1935, has overlooked, presumably inadvertently, the gift in remainder to Mrs. Donner's living issue, or next of kin, in default of exercise of the power.

We are also constrained to disagree with the conclusion of the Florida Supreme Court that the agreement of 1935 created an agency relationship. The decision in this respect is based, apparently, solely upon the provisions of the agreement, itself, reserving certain powers to Mrs. Donner and requiring in some instances joint action by the trustee and the advisor. As we have pointed out, the reservation of a power to revoke or appoint the corpus of an *inter vivos* trust does not transform the relationship into one of agency. Nor is there anything in the provisions relating to the trust advisor which suggests that the advisor was subject to the dictates of Mrs. Donner. Even the facts concerning the operation of the trust, which we suspect were not before the Florida court, rebut the violent presumption necessary to be made to support the conclusion reached. The opinion of the Florida Supreme Court is not persuasive as an authority.

We think our discussion of the validity of the agreement as an *inter vivos* trust is sufficient answer to other authorities relied upon by the Lewis Group in support of its [fol. 305] contentions under this point.

The second fundamental question is what effect, if any, does the adverse judgment entered in the Florida litigation have upon the right of the Hanson Group to litigate the question of essential validity of the trust of 1935 in Delaware.

The Florida judgment is an adjudication that by reason of the probate of Mrs. Donner's will, Florida, as the state of domiciliary administration, has substantive jurisdiction to inquire into the validity of the 1935 trust and the exercise of the powers of appointment, references to which were made in the will, and to hold them invalid under Florida law. Upon this point, the Supreme Court of Florida affirmed the trial court's ruling of invalidity. In the cross appeal, which sought a review of the trial court's holding that Florida lacked jurisdiction over the non-appearing defendants (among which were Wilmington Trust Company, Delaware Trust Company),⁸ the Florida Supreme Court reversed the trial court and held that jurisdiction over the trustee under the trust and the beneficiaries of the exercise of the power of appointment could be obtained by constructive service.

[fol. 306] In their answer the Lewis Group pleads the Florida judgment and upon the basis of it asks for certain relief. The first prayer for relief is that Delaware Trust Company be ordered to account for the \$400,000 received by it from the trustee and be directed to transfer it to the executrix of Mrs. Donner's will. The second prayer for relief is, in the event Delaware Trust Company not be ordered to account, that a money judgment be entered against Wilmington Trust Company in the amount of \$417,000 with interest.

With respect to the second prayer for relief, it is obvious that, irrespective of the demand that Delaware Trust Company be ordered to account, the Lewis Group seeks a personal judgment against Wilmington Trust Company from the inclusion in the prayer for a judgment of \$17,000, since Delaware Trust Company has never received this sum.

The Lewis Group, therefore, seeks to use the Florida judgment as the basis for an assertion of personal liability

⁷ By stipulation of the parties the record has been augmented to include the Florida judgment as finally framed by the Supreme Court of Florida, to all intents and purposes as though it had been pleaded and proven in the court below.

⁸ The recipients of \$3,000 of the \$17,000 appointment were not even named as parties *pro forma* in the Florida action.

against Wilmington Trust Company, and as a judgment *in rem* dispositive of the entire trust corpus. The full faith and credit clause of Article IV of the Federal Constitution is invoked.

The demand of full faith and credit for the Florida judgment as the prop for the assertion of personal liability against Wilmington Trust Company is defeated by the fact that Wilmington Trust Company has never been served personally with Florida process, nor has it appeared in any [fol. 307] form in the Florida litigation. The recital of these facts is sufficient to require the denial of full faith and credit to the Florida judgment when it is sought to be made the basis for the assertion of personal liability. *Iowa-Wisconsin Bridge Co. v. Phoenix Corp.*, 2 Terry 527, 25 A. 2d 383, cert. den. 317 U.S. 671. It follows, therefore, that the prayer of the Lewis Group for a money judgment against Wilmington Trust Company was properly denied.

Next, the Lewis Group argues that the Florida judgment is entitled to full faith and credit as a judgment *in rem*. It is, of course, true that the courts of Florida may adjudicate with respect to a *res* within its boundaries and subject to its control, and full faith and credit may be successfully claimed for such a judgment in the courts of other states. *Restatement, Conflict of Laws*, §429. But a judgment which has the force of a judgment *in rem* with respect to assets located in Florida does not acquire by reason of the full faith and credit clause any extra-territorial effect upon assets located outside of the State of Florida in the absence of seizure by the Florida courts. *Riley v. New York Trust Co.*, 315 U.S. 343, 62 S.Ct. 609. To have any extra-territorial effect such a judgment must have been rendered after the acquisition of personal jurisdiction over the party claiming the non-Florida assets. *Baker v. Baker, Eccles & Co.*, 242 U.S. 394, 37 S.Ct. 152.

The *res*, over which these parties are contending, consists [fol. 308] entirely of corporate securities which at all times since 1935 have been located in Delaware. There has been no seizure of them by any judicial process in Florida, nor has any person or corporation holding the assets voluntarily by appearance brought them before the Florida courts.

The Supreme Court of Florida purports to find jurisdiction over this trust *res* by reason of the Florida domicile of Mrs. Donner and the probate there of her will. In an action brought to construe that will it rendered a decision "as to whether or not the instruments which created their [remainder] interests were effective to shift the trust property out of the estate of the testatrix." This was done on the theory that the last effective act of Mrs. Donner to establish remainder interests in the trust corpus; i.e., the execution of the power of appointment of 1949, was performed by her while a resident of Florida and amounted to a republication of the trust of 1935; it was held that it was as if the original instrument had been executed while she was domiciled in Florida. As we have pointed out, this result is contrary to the law of Delaware, and also the recent trend of well considered decisions in other states.

The Florida court relies upon *Henderson v. Usher*, 118 Fla. 688, 160 S. 9, but as we read that case it does not support their holding. In the *Henderson* case an action was filed for the construction of the will of a Florida decedent which purported to exercise a power of appointment over [fol. 309] the corpus of an *inter vivos* trust created by a Florida resident in New York with a New York trustee. The donor deposited the securities comprising the trust corpus in New York, and in the instrument gave a power of appointment by will to the life beneficiary, a Florida resident. The will of the Florida donee of the power created an admittedly testamentary trust by the exercise of his power of appointment over the *inter vivos* trust corpus. Thereafter, the trustees of the testamentary trust, non-residents of Florida, instituted suit for the construction of the Florida will so that they might be instructed as to their duties under the will and the testamentary trust.

The precise question in the *Henderson* case was the validity of constructive service upon the widow of the testator, who had remarried and was a resident of New York. Constructive service upon her was upheld upon the ground that the *res* before the court was the Florida will, and the trust established by it, and since the trustees under the will had voluntarily submitted it to the courts of Florida for adjudication, jurisdiction had thereby been

conferred over the testamentary trust. Furthermore, there was no question but that the Florida will had by the exercise of the power created a Florida testamentary trust. In issue was the right of the widow to receive income from the testamentary trust. There was no issue concerning the rights of anyone arising out of the New York *inter vivos* trust.

[fol. 310] • The *Henderson* case, therefore, is not authority for the assertion of jurisdiction by Florida over an *inter vivos* trust created and administered in Delaware. The will of Mrs. Donner, contrary to the apparent view of the Florida Supreme Court, did not exercise the reserved power of appointment. That power was exercised in 1949 and a part of the Delaware trust corpus was appointed to her Florida executrix and disposed of by the residuary clause of her will. With respect to this portion of the *inter vivos* trust corpus, it is clear that Florida has jurisdiction since it passes as part of Mrs. Donner's estate; but with respect to the \$417,000 appointed to non-Floridians it is equally clear, not only that Mrs. Donner did not intend it to pass as part of her estate, but that Florida has never had the remotest connection with or power over it.

The Florida Supreme Court cites as further authority for its assumption of jurisdiction over the 1935 trust the case of *Swetland v. Swetland*, 105 N.J. Eq. 608, 149, A. 50; aff. 107 N.J. Eq. 504, 153 A. 907. This case, however, is not authority for the assumption of jurisdiction under these circumstances. The *Swetland* case was a bill for accounting against a non-resident trustee based on the dissipation and misappropriation of the corpus of an *inter vivos* trust created and administered in New York. The complainants sought an injunction against the New Jersey executors of the creator's New Jersey will, which added a large amount [fol. 311] to the original *inter vivos* trust corpus, from paying it over to the trustee, and sequestered the non-resident trustee's interest in the creator's New Jersey estate. Since the assets themselves were in the hands of New Jersey executors and had by sequestration been subjected to the power of the court, it was held that irrespective of the situs of the trust the court could enforce its decree to the extent of the property sequestered. It is plain that the *Swetland* case is distinguishable.

It follows, therefore, that the Florida judgment is not entitled to full faith and credit as a judgment *in rem* as to the \$417,000 which has never been subjected to the control of the Florida court and, as such, a bar to the action before us.

The Lewis Group next argues that irrespective of full faith and credit, the Florida judgment precludes the litigation of the question of essential validity of the 1935 trust as a matter of *res adjudicata* or, in the alternative, as a matter of collateral estoppel.

The doctrine of *res adjudicata* has no application in the pending action because the essence of the doctrine is that the prior judgment raised as a bar must have been rendered in a prior action between the same parties involving the same cause of action asserted in the second action. *Restatement, Judgments*, §48; *Collateral Estoppel by Judgment*, 56 Harv. L.R. 1. It is obvious that we are dealing here with an entirely different cause of action from that tried in [fol. 312] Florida. In Florida the issue was, what assets passed under the will of Mrs. Donner? The Florida ruling, that the exercise of the power of appointment was testamentary, was an implicit ruling of invalidity of the 1935 agreement as an *inter vivos* trust, but it was only incidental to the main issue raised in the Florida proceeding.

This fact is sufficient answer to the assertion of the defense of *res adjudicata*, but it would seem to be clear that it could not be availed of in any event because of the inherent lack of jurisdiction of the Florida courts over some of the parties to this cause and over the subject matter of this suit.

The Lewis Group argues, in the alternative, that the Hanson Group, however, are collaterally estopped by the Florida judgment from relitigating the question of essential validity of the 1935 agreement as an *inter vivos* trust. The doctrine of collateral estoppel is recognized and applied in proper cases by Delaware courts. *Petrucci v. Landon*, 9 Terry 491, 107 A. 2d 236; *Niles v. Niles* (Del. Ch.), 111 A. 2d 697.

Florida in a direct proceeding would have had no jurisdiction to determine the validity of an *inter vivos* trust whose situs was in Delaware and whose trustee was not

subject to Florida process. 54 *Am. Jur., Trusts*, §564, §584; *Lines v. Lines*, 142 Pa. 149, 21 A. 809. It may, however, occur that in an action in Florida over which Florida admittedly has jurisdiction it might become necessary for [fol. 313] the Florida court to decide a question which it would have had no jurisdiction over in a direct proceeding brought for that purpose. In such event, when such question has actually been litigated and fought out by the same parties in the prior action, a collateral estoppel may sometimes be raised against such parties in a second action in which the same issue is raised. We are of the opinion, however, that no collateral estoppel arises in the pending case.

In the first place, a recognized exception to the doctrine exists when the second action is brought in a court having jurisdiction of the subject matter and parties to determine directly the issue decided only incidentally in the first action. *Restatement, Judgments*, §71; *Collateral Estoppel by Judgment*, 56 Harv. L.R. 1, 22; *Annotation*, 147 A.L.R. 225. The action before us was brought in the Court of Chancery to determine directly the validity of the 1935 agreement as an *inter vivos* trust and that court has jurisdiction of the subject matter and the necessary parties. Since the holding of invalidity by the Florida courts was only incidental to the main issue presented to it, the case falls directly within the exception to the doctrine.

In the second place, the doctrine of collateral estoppel is applied only when the same parties in the second action have had their day in court in the first action on the issue in question. This rule is based on the consideration that the proper administration of justice will be served best [fol. 314] by limiting parties to one trial of one issue. See *Niles v. Niles*, *supra*.

The Florida judgment does not meet this condition, for the Delaware trustee and the beneficiaries of the exercise of the power have never had their day in court on this issue.

It does not answer this objection to argue, as the Lewis Group does, that these parties received notice of the pendency of the Florida action and could have appeared in that forum and defended the action. To be sure, they could have done so, but they elected not to, for there was no *res*

before the Florida court the seizure of which would have furnished a compulsive force for their appearance. To hold that in the absence of jurisdiction over the *res* in controversy Florida can compel appearance through substituted service would be a violation of the due process clause of the 14th Amendment. *Pennoyer v. Neff*, 95 U.S. 714, 24 S.Ct. 565.

The Lewis Group argues, however, that Wilmington Trust Company and Delaware Trust Company are bound by the Florida judgment to all intents and purposes as though they had appeared in the cause because the various beneficiaries of the trusts were subject to the jurisdiction of the Florida court.⁹ The argument is that when a *cestui que trust* is bound by the judgment of a court, the trustee [fol 315] is likewise bound because he is in privity with the *cestui*. It is argued that these particular trustees were mere stakeholders and, as such, were unnecessary parties to the Florida action. *Thompson v. Hammond*, (N.Y.) 1 Edw. Ch. 497, and *First National Bank v. Ickes*, 60 F. Supp. 366, are cited in support of the argument. We have read these cases and are of the opinion that they do not remotely support the contention.

Furthermore, we think it the law that while a *cestui que trust* is bound in most circumstances by an adjudication against his trustee, *Iowa-Wisconsin Bridge v. Phoenix Corp.*, supra, the converse of that proposition is not the law, particularly when the adjudication affects the existence of the trust itself. It is the duty of a trustee to defend the existence of his trust, 2 *Scott on Trusts*, §178, even against an attempt by the settlor and sole beneficiary to overthrow it. Cf. *Weymouth v. Delaware Trust Co.*, 29 Del. Ch. 1, 45 A. 2d 427. A trustee is also an indispensable party to a suit involving the trust property, and in defense of title to the trust property. 54 *Am. Jur., Trusts*, §584.

In view of this, it is impossible to accept on principle the argument that a judgment against a *cestui que trust* binds the non-appearing trustee. At the argument, counsel for both groups stated that they had found no authority

⁹ No similar argument is made with respect to the recipients of the \$17,000 appointment.

so holding, nor have our own researches disclosed any. Upon reflection, we are not surprised that there is none, for any such rule might permit a beneficiary by shopping [fol. 316] around among jurisdictions to defeat the trust against the manifest intent of the trustor. We, therefore, are of the opinion that the non-appearing defendants in Florida are not estopped by the judgment on the ground of privity with appearing defendants.

Finally, we think the public policy of Delaware precludes its courts from giving any effect at all to the Florida judgment of invalidity of the 1935 trust. We are dealing with a Delaware trust. The trust *res* and trustee are located in Delaware. The entire administration of the trust has been in Delaware. The attack on the validity of this trust raises a question of first impression in Delaware and one of great importance in our law of trusts. To give effect to the Florida judgment would be to permit a sister state to subject a Delaware trust and a Delaware trustee to a rule of law diametrically opposed to the Delaware law. It is our duty to apply Delaware law to controversies involving property located in Delaware, and not to relinquish that duty to the courts of a state having at best only a shadowy pretense of jurisdiction. Cf. *Taylor v. Crosson*, 11 Del. Ch. 145, 98 A. 375.

We conclude, therefore, that the agreement of 1935 between Mrs. Donner and Wilmington Trust Company created a valid *inter vivos* trust, that the exercise by Mrs. Donner of the power of appointment reserved in that agreement was effective to dispose of the trust corpus, and that the parties to this cause are not estopped by the Florida [fol. 317] judgment from having those questions adjudicated by the Delaware Court of Chancery.

The judgment of the Court of Chancery will be affirmed.

[fol. 318] STATE OF DELAWARE,
KENT COUNTY, ss.:

I, T. E. Townsend, Jr., Clerk of the Supreme Court of the State of Delaware, do hereby certify that the foregoing is a true and correct copy of opinion dated January 14, 1957 in cause No. 8, 1956.

as the same remains on file and of record in said Court.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Court at Dover this 16th day of January, A. D. 1957.

/s/ T. E. Townsend, Jr.
Clerk of the Supreme Court.

(SEAL)

[fol. 320] IN THE SUPREME COURT OF FLORIDA

[Title omitted]

MOTION TO STRIKE EXTRAORDINARY PETITION FOR
REHEARING—Filed January 30, 1957

Come now the Appellees and move to strike the Extraordinary Petition for Rehearing filed by the Appellants in this case on the following grounds:

1.

The rules of this Court do not permit the filing of an Extraordinary Petition for Rehearing. The stay of the mandate by the Supreme Court of Florida was for the purpose of permitting Appellants to file a petition in the Supreme Court of the United States for writ of certiorari and not for the purpose of allowing them to file an additional petition for rehearing.

2.

Appellees move to strike Paragraph 1 of the Extraordinary Petition for Rehearing on the ground that the

decision of the Supreme Court of Delaware is not entitled to full faith and credit, because the Florida case originated first and the decision of the Supreme Court of Florida was final before the decision of the Supreme Court of Delaware.

3.

Appellees move to strike Paragraph 2 of the Extraordinary Petition for Rehearing on the ground that it is a mere conclusion of the pleader.

[fol. 321]

4.

Appellees move to strike Paragraph 3, of the Extraordinary Petition for Rehearing on the ground that it is a conclusion of the pleader and on the further ground that the decision of the Supreme Court of Florida is in full force and effect and in all respects enforceable.

Wherefore Appellees pray that said Extraordinary Petition for Rehearing be stricken.

Redfearn & Ferrell, 550 Brickell Avenue, Miami, Florida and

C. Robert Burns, 1318 Harvey Building, West Palm Beach, Florida, Attorneys for Appellees.

CERTIFICATE OF SERVICE (omitted in printing)

[fol. 323] IN THE SUPREME COURT OF FLORIDA

[Title omitted]

ORDER GRANTING MOTION OF APPELLEES TO STRIKE
APPELLANTS EXTRAORDINARY PETITION FOR
REHEARING—February 18, 1957

The attorneys for appellants have filed a motion for an order allowing them to file an extraordinary petition for rehearing in the above cause and the attorneys for appellees have filed a motion to strike motion for leave to file extra-

ordinary petition for rehearing, and the same having been duly considered, it is ordered that the motion of attorney for appellees to strike be and the same is hereby granted.

[fol. 325] IN THE SUPREME COURT OF THE STATE OF FLORIDA

[Title omitted]

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES—Filed February 21, 1957

I. Notice is hereby given that Elizabeth Donner Hanson; Individually, as Executrix of the will of Dora Browning Donner, Deceased, and as Guardian ad Litem for Joseph Donner Winsor and Donner Hanson, and William Donner Roosevelt, Individually, the Appellants above named, hereby appeal to the Supreme Court of the United States from the final judgment of the Supreme Court of Florida, affirming in part and reversing in part a Summary Final Decree of the Circuit Court of the Fifteenth Judicial Circuit in and for Palm Beach County, Florida, entered in this action on November 28, 1956.

This appeal is taken pursuant to 28 U.S.C. Sec. 1257-(2).

[fol. 326] II. The Clerk will please prepare a transcript of the entire record in this cause, for transmission to the Clerk of the Supreme Court of the United States, and include in said transcript the following:

(a) The transcript of the record of proceedings in the Circuit Court of Palm Beach County.

(b) Petition to the Supreme Court of Florida filed in this action on May 14, 1954, for a Writ of certiorari to review an order of the Circuit Court of Palm Beach County dated April 9, 1954, postponing ruling on motion of Appellants to dismiss action for want of jurisdiction.

(c) Petition for rehearing of order denying afore-said petition, filed in the Supreme Court of Florida on July 13, 1954.

(d) Petition to the Supreme Court of Florida filed in this action on September 28, 1954, for a Writ of Certiorari to review an order of the Circuit Court of Palm Beach County dated August 25, 1954, denying Appellants motion to stay the proceedings in said Court pending determination of the questions involved in this action by the Court of Chancery of the State of Delaware.

(e) Motion to remand filed by Appellants in this action on March 19, 1956, including copy of Opinion [fol. 327] of the Court of Chancery of the State of Delaware dated December 28, 1955, and copy of order of said Court dated January 13, 1956.

(f) Response of Appellees to said motion to remand and motion to dismiss said motion filed in this action on March 27, 1956.

(g) Opinion of this Court filed September 19, 1956.

(h) Petition of Appellants to extend time for filing petition for rehearing filed in the Supreme Court of Florida on September 28, 1956.

(i) Order of the Supreme Court of Florida dated September 28, 1956, extending time for filing petition for rehearing.

(j) Petition of Appellants for rehearing filed in this action on October 13, 1956.

(k) Motion of Appellees to strike petition for rehearing and to order a mandate without delay.

(l) Order of the Supreme Court of Florida denying petition for rehearing dated November 28, 1956.

(m) Petition of Appellants for a stay of the mandate filed in this action on November 28, 1956.

(n) Order of the Supreme Court of Florida granting stay of mandate dated November 28, 1956.

[fol. 328] (o) Motion of Appellants for leave to file extraordinary petition for rehearing filed in this action on January 25, 1957.

(p) Motion of Appellees to strike motion for leave to file extraordinary petition for rehearing filed in this action on January 30, 1957.

(q) Order of the Supreme Court of Florida granting motion of Appellees to strike Appellants motion for leave to file extraordinary petition for review filed herein on February 18, 1957.

(r) This Notice of Appeal.

III. The following questions are presented by this appeal:

(a) Do the provisions of Chapter 48, Florida Statutes, Sections 48.01 and 48.02, violate the Constitution of the United States (in particular, Section 1 of the Fourteenth Amendment thereto) where said Statute is used by the Supreme Court of Florida as a basis for jurisdiction to decree the devolution of property outside its jurisdiction and in the hands of trustees who were not personally served with process, who have not appeared in the proceedings and who have no places of business, have never conducted business and have no officers, agents or representatives in the State of Florida?

[fol. 329] (b) Do the provisions of Chapter 48, Florida Statutes, Sections 48.01 and 48.02, violate the Constitution of the United States (in particular, Section 1 of the Fourteenth Amendment thereto) where said Statute (in particular, 48.01 (5)) was used by the Supreme Court of Florida, under the guise of construing a *clear and unambiguous* will, for the sole purpose of declaring invalid an inter vivos trust whose situs, property and trustees were all outside the jurisdiction of the Court and whose trustees were not personally served with process and did not appear in the proceedings?

(c) Does the refusal of the Supreme Court of Florida to give full faith and credit to the judgment of the Court of Chancery of the State of Delaware and the Supreme Court of the State of Delaware, both courts of competent jurisdiction, having control over the trust

res, the trustees and all of the beneficiaries of the trust contravene the Constitution of the United States (in particular, Section 1 of Article IV thereof)?

(d) Did the Supreme Court of Florida err in refusing to apply the law of Delaware in determining the validity of a trust having its situs in Delaware?

(e) Did the Supreme Court of Florida err in hold-[fol. 330] ing that the inter vivos trust agreement was valid insofar as it created a beneficial life estate in the settlor and that it was republished in Florida so as to become subject to jurisdiction of the Florida Courts for the sole purpose of decreeing its invalidity?

(f) Did the Supreme Court of Florida err in reaching a conclusion which is totally lacking in comity and is unenforceable in the face of the mandate of the Court of Chancery of the State of Delaware and the Supreme Court of the State of Delaware?

/s/ Manley P. Caldwell, Attorney for Elizabeth Donner Hanson, Individually, as Executrix of the will of Dora Browning Donner, Deceased, and as Guardian ad Litem for Joseph Donner Winsor and Donner Hanson, and William Donner Roosevelt, Individually, 501 Harvey Building, West Palm Beach, Florida.

/s/ Edward McCarthy, Attorney for Elizabeth Donner Hanson, as Guardian ad Litem as aforesaid, Atlantic National Bank Building, Jacksonville, Florida.

Of Counsel, /s/ Wm. H. Foulk, 229 Delaware Trust Building, Wilmington, Delaware.

[fol. 331] PROOF OF SERVICE (omitted in printing)

[fol. 332] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 333] SUPREME COURT OF THE UNITED STATES

No. 918—October Term, 1956

Elizabeth Donner Hanson, Individually, as Executrix of
the Will of Dora Browning Donner, Deceased, et al.,
Appellants.

v.

Katherine N. R. Denckla, Individually, and Elwyn L. Middleton, as Guardian of the Property of Dorothy Browning Stewart, etc.

Appeal from the Supreme Court of the State of Florida.

ORDER POSTPONING JURISDICTION—June 17, 1957

The statement of jurisdiction in this case having been submitted and considered by the Court, further consideration of the question of jurisdiction is postponed to the hearing of the case on the merits. The case is consolidated with No. 977 and a total of two hours allowed for oral argument.

IN SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1957

No. 107

APPEAL FROM THE SUPREME COURT OF THE STATE OF FLORIDA

ELIZABETH DONNER HANSON, Individually, as Executrix of
the Will of DORA BROWNING DONNER, Deceased, et al.,
Appellants,

v.

KATHERINE N. R. DENCKLA, Individually, and ELWYN L.
MIDDLETON, as Guardian of the Property of DOROTHY
BROWNING STEWART, etc., Appellees.

STIPULATION—Filed December 13, 1957

It Is Hereby Stipulated And Agreed by and between
the attorneys for the respective parties hereto that the
attached certified copy of Notice of Suit shall be printed
by the Clerk and considered as a part of the printed Trans-
cript of Record herein. This stipulation is based upon
the fact that the printed Transcript of Record on file herein
fails to show the following, which should have appeared
at the end of the Notice of Suit appearing at pages 37 and
38 of such Transcript of Record:

"14 copies of the plaintiff's initial pleadings were mailed
this date, with copy of the above notice of suit, to all
parties whose addresses are stated in the initial plead-
ings or affidavit.

Dated January 25, 1954

J. Alex Arnette, Clerk Circuit Court

By /s/ Thaddie P. Plant.
Deputy Clerk"

This stipulation dated this 22nd day of November, 1957.

William H. Foulk, 229 Delaware Trust Building, Wilmington 1, Delaware; Manley P. Caldwell, Caldwell, Paettti, Robinson & Foster, 501 Harvey Building, West Palm Beach, Florida, Attorneys for Elizabeth Donner Hanson, Individually, as Executrix of the Will of Dora Browning Donner, Deceased, and as Guardian ad Litem for Joseph Donner Winsor and Donner Hanson, and William Donner Roosevelt, Appellants:

Of Counsel: Edward McCarthy, McCarthy, Lane & Adams, 423 Atlantic Bank Building, Jacksonville, Florida, Attorney for Elizabeth Donner Hanson as Guardian ad Litem for Joseph Donner Winsor and Donner Hanson.

D. H. Redfearn, 550 Brickell Avenue, Miami 32, Florida; C. Robert Burns, 1318 Harvey Building, West Palm Beach, Florida, Attorneys for Appellees.

Of Counsel for Appellees: R. H. Ferrell, 550 Brickell Avenue, Miami 32, Florida; Sol A. Rosenblatt, 630 Fifth Avenue, New York 20, N. Y.; Charles Roden, 630 Fifth Avenue, New York 20, N. Y.

NOTICE TO APPEAR AND DEFEND

IN THE CIRCUIT COURT OF THE FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH COUNTY, FLORIDA—IN CHANCERY

No. 31,980

(Rubber stamp)

Filed

Jan 22 1954

J. Alex Arnette

Clerk of Circuit Court

By Thaddie P. Plant, D.C.

KATHERINE N. R. DENCKLA, individually, and ELWYN L. MIDDLETON, as guardian of the property of DOROTHY BROWNING STEWART, also known as Dorothy B. Stewart and Dorothy B. Rodgers Stewart; an incompetent person, Plaintiffs,

v.

WILMINGTON TRUST COMPANY, a Delaware corporation,
et al., Defendants.

To: Wilmington Trust Company, in its individual corporate capacity and as trustee, Wilmington, Delaware;

Louisville Trust Company, in its individual corporate capacity and as trustee, Louisville, Kentucky;

Delaware Trust Company, in its individual corporate capacity and as trustee, Wilmington, Delaware;

Bryn-Mawr Hospital, in its individual corporate capacity and as trustee, Bryn-Mawr, Pennsylvania;

The Donner Corporation, a Pennsylvania corporation, 1710 Fidelity Trust Building, Philadelphia, Pennsylvania;

Benedict H. Hanson, 510 Park Avenue, Apartment B-4, New York, N. Y.;

John Stewart, Beachwood Road, Rosemont, Pennsylvania;

Dora Browning Stewart Lewis, 7000 Glendale, Chevy Chase, Maryland;

Mary Washington Stewart Borie, 6912 Madisonville Road, Marimont, Cincinnati, Ohio;

Miriam V. Moyer, 1719 Fidelity Trust Building, Philadelphia, Pennsylvania;

James Smith, 221 Williams Road, Rosemont, Pennsylvania;

Dora Donner Ide, 485 Park Avenue, New York, N. Y.;

Paula Browning Denckla, 5 East 67th Street, New York, N. Y.;

William Donner Denckla, 5 East 67th Street, New York, N. Y.;

You and each of you are hereby notified that a bill for declaratory decree has been filed against you in the above styled case and you and each of you are required to file your answer thereto with the clerk of said court and to serve a copy thereof upon Burns, Middleton & Rogers, or Redfearn & Ferrell, attorneys for plaintiffs, whose addresses are shown below, on or before the 25th day of February, 1954, otherwise decree pro confesso will be entered against you.

Dated at West Palm Beach, Florida, January 22nd, 1954.

(SEAL)

J. Alex Arnette, Clerk of said Circuit Court, by
Thaddie P. Plant, Deputy Clerk.

C. Robert Burns, Harvey Building, West Palm Beach, Florida and Redfearn & Ferrell, 550 Brickell Avenue, Miami, Florida, Attorneys for Plaintiffs.

(Handwritten)

Publish: Palm Beach Times, Jan. 23, 30; Feb. 6, 13, 1954.

(Rubber stamp)

14 Copies of the plaintiff's initial pleadings were mailed this date, with copy of the above notice of suit, to all parties whose addresses are stated in the initial pleadings or affidavit.

Dated January 25, 1954.

J. Alex Arnette, Clerk Circuit Court, by Thaddie P. Plant, Deputy Clerk.

STATE OF FLORIDA,

COUNTY OF PALM BEACH, ss.:

I, J. Alex Arnette, Clerk of the Circuit Court of the Fifteenth Judicial Circuit of Florida, do hereby certify that the above and foregoing is a true and correct photostatic copy of the following, to-wit:

Notice To Appear And Defend with Certificate of Clerk as to mailing copies of Plaintiffs' initial Pleadings, with copy of said Notice to Appear and Defend, to All parties whose addresses are stated in the initial pleadings or affidavits, on January 25th, 1954—as filed in this office, January 22nd, 1954, in Chancery No. 31,980 in the case of Katherine N. R. Denckla, individually, and Elwyn L. Middleton, as Guardian of the property of Dorothy Browning Stewart, Etc., Plaintiffs vs. Wilmington Trust Company, a Delaware corporation; et al. Defendants.

In Witness Whereof, I have hereunto set my hand and seal of said Court at West Palm Beach, Florida, this the 25th day of November, A. D. 1957.

J. Alex Arnette, Clerk of Circuit Court, Palm Beach County, Florida, by Mamie L. Harman, Deputy Clerk.

(SEAL)

SUPREME COURT
TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1957

No. 117

DORA STEWART LEWIS, MARY WASHINGTON
STEWART BORIE AND PAULA BROWNING
DENCKLA, PETITIONERS,

vs.

ELIZABETH DONNER HANSON, AS EXECUTRIX
AND TRUSTEE UNDER THE LAST WILL OF DORA
BROWNING DONNER, DECEASED, ET AL.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF
THE STATE OF DELAWARE

PETITION FOR CERTIORARI FILED MAY 7, 1957
CERTIORARI GRANTED JUNE 17, 1957

INDEX

	Original	Print
Proceedings in the Supreme Court of the State of Delaware		
Docket entries	A	b
Præcipe	F	d
Citations and sheriff's returns	J	g
Appellant's appendix—see separate index		
Excerpts from affidavit of C. Kenneth Baxter, dated November 12, 1954 (copy) (omitted in printing)	203	A203
Motion of Robert B. Walls, Jr., guardian ad litem for leave to file joint briefs with appellants and order thereon	205	A203
Order assigning Associate Judge Caleb R. Layton, III, etc.	209	A204
Order rescinding the assignment of Judge Caleb R. Layton, III and naming Judge James B. Carey, etc.	210	A205
Motion to remand	211	A205
Opinion of Supreme Court of Florida, Hobson, J., dated September 19, 1956	214	A207
Stipulation pertaining to remand and order thereon	227	A218
Stipulation pertaining to Florida order denying petition for rehearing and order granting stay	229	A220
Order of the Supreme Court of Florida granting a stay, dated November 28, 1956	231	A221
Order of the Supreme Court of Florida denying a petition for rehearing, dated November 28, 1956	232	A222
Opinion, Wolcott, J.	235	A222
Petition for re-argument or in the alternative, a petition for a stay of mandate	270	A245
Order staying mandate	275	A248
Clerk's certificate	277	
Stipulation filed in U.S. Supreme Court re the inclusion of additional parts of the record	276	A249
Affidavit of Paul D. Lovett, dated November 12, 1954 filed in The Court of Chancery of the State of Delaware in and for New Castle County	279	A252
Exhibit A—Trust agreement between Elizabeth Donner Hanson and Delaware Trust Company as Trustee for the benefit of Donner Hanson and others, dated November 26, 1948	282	A254
Exhibit B—Trust agreement between Elizabeth Donner Hanson and Delaware Trust Company for the benefit of Joseph Donner Winsor and others, dated November 26, 1948	291	A262
Exhibit C—Trust agreement between William H. Donner and Montreal Trust Company, dated August 6, 1940 for the benefit of Katherine N. R. Denckla Ordway and others with the following attachments	299	A270
Schedule A	311	A283
Letter from Robert N. Donner, John Stewart, and Dora Donner Ide to Montreal Trust Company, dated October 11, 1940	312	A284

	Original	Print
Deed of conveyance of additional securities dated June 26, 1941 from W. H. Donner to Montreal Trust Company, trustee under agreement dated August 6, 1940 with attachment	313	A285
Schedule "A"	315	A288
Letter from Donner Estates, Inc. to Montreal Trust Company, dated June 23, 1941	316	A289
Letter from Donner Estates, Inc. to Delaware Trust Company, dated June 23, 1941	318	A291
Letter from Donner Estates, Inc. to Delaware Trust Company, dated June 23, 1941	319	A292
Letter from Delaware Trust Company to Donner Estates, Inc., dated June 26, 1941	320	A293
Letter from Delaware Trust Company to Montreal Trust Company, dated June 26, 1941	321	A294
Clerk's certificate (omitted in printing)	322	A295
Affidavit of George Ainslie Goad, dated November 10, 1954 filed in the Court of Chancery of the State of Delaware in and for New Castle County	323	A295
Clerk's certificate (omitted in printing)	324A	A297
Affidavit of C. Kenneth Baxter (Paragraphs 10, 11, & 12), dated November 12, 1954 filed in the Court of Chancery of the State of Delaware in and for New Castle County	325	A297
Clerk's certificate (omitted in printing)	331	A299
Petition of Elwyn L. Middleton for order authorizing transfer of money to foreign trustee, verified March 18, 1953, filed in the Court of Chancery of the State of Delaware in and for New Castle County in the case entitled, "In the matter of Dorothy B. R. Stewart, an insane person"	332	A299
Final return of E. Harris Drew, etc. covering the period of June 25, 1952 to December 12, 1952 (omitted in printing)	336	
Order of the County Judges Court in and for Palm Beach County, Florida accepting resignation of Guardian and appointing successor guardian, dated December 22, 1952	343	A302
Letters of guardianship granted to Elwyn L. Middleton	345	A304
Letters of discharge of E. Harris Drew	347	A305
Certification of the Register in Chancery in and for New Castle County	349	A307
Order of The Honorable Collins J. Seitz, Chancellor, dated November 27, 1953 in the Court of Chancery of the State of Delaware in and for New Castle County	350	A308
Certification of the Register in Chancery in and for New Castle County Delaware	353	A311

	Original	Print
Clerk's certificate (omitted in printing)	354	A311
Affidavit of Paul D. Lovett, dated October 24, 1955 filed in the Court of Chancery of the State of Delaware in and for New Castle County	355	A312
Affidavit of C. Kenneth Baxter, dated October 24, 1955 filed in the Court of Chancery of the State of Delaware in and for New Castle County	357	A313
Clerk's certificate	360	A315
Order allowing certiorari	364	A315

[fol. A]

**IN THE SUPREME COURT OF THE
STATE OF DELAWARE**

No. 8—1956 Term

DORA STEWART LEWIS, MARY WASHINGTON STEWART BORIE
and PAULA BROWNING, Defendants Below, Appellants,

v.

ELIZABETH DONNER HANSON, as Executrix and Trustee
under the Last Will of Dora Browning Donner, de-
and PAULA BROWNING DENCKLA, Defendants Below, Ap-
pellants,

WILMINGTON TRUST COMPANY, a Delaware corporation as
Trustee under three separate Agreements, (1) and (2)
with William H. Donner dated March 18, 1932 and
March 19, 1932, and (3) with Dora Browning Donner
dated March 25, 1935, Defendant below, Appellee,

DELAWARE TRUST COMPANY, a Delaware corporation, as
Trustee under three separate Agreements, (1) with Wil-
liam H. Donner, dated August 6, 1940, and (2) and (3)
with Elizabeth Donner Hanson, both dated November
26, 1948, Defendant below, Appellee,

KATHERINE N. R. DENCKLA, Defendant below, Appellee,
ROBERT B. WALLS, Esquire, Guardian ad litem for DOROTHY
B. R. STEWART, and WILLIAM DONNER DENCKLA, De-
fendant below, Appellee,

ELWYN L. MIDDLETON, Guardian of the property of DOROTHY
B. R. STEWART, a mentally ill person, Defendant below,
Appellee,

EDWIN D. STEELE, JR., Esquire, Guardian ad litem for
JOSEPH DONNER WINSOR, CURTIN WINSOR, JR., and
DONNER HANSON, Defendant below, Appellee,

[fol. B] BRYN MAWR HOSPITAL, a Pennsylvania corpora-
tion, MIRIAM V. MOYER, JAMES SMITH, WALTER HAMIL-
TON, DOROTHY A. DOYLE, RUTH BRENNER and MARY
GLACKENS, Defendants below, Appellees,

LOUISVILLE TRUST COMPANY, a Kentucky corporation, as
Trustee for BENEDICT H. HANSON, and as Trustee under
agreements with William H. Donner, Defendant Below,
Appellee,

WILLIAM DONNER ROOSEVELT, JOHN STEWART and BENEDICT
H. HANSON, Defendants Below, Appellees.

DOCKET ENTRIES

- A. 1956, February 15: Received and filed praeceipe on appeal from all of the judgment of the Court of Chancery of the State of Delaware in and for New Castle County dated the 13th day of January, A.D. 1956; and all of the Order of said Court dated the 25th day of January, 1956. Writs issued to Sheriff of Kent County.
- B. 1956, February 27: Record received and filed. Counsel notified.
- C. 1956, March 6: Received and filed Sheriff's return.
- D. 1956, March 26: Received and filed stipulation, and order thereon, extending time for filing appellant's brief.
- E. 1956, April 12: Received and filed appellant's brief and appendix.
- F. 1956, April 13: Received and filed motion of Robert B. Walls, Jr., Guardian Ad Litem, for leave to file joint briefs with appellants, and order thereon.
- G. 1956, April 17: Received and filed stipulation, and order thereon, extending time for filing of briefs.
- H. 1956, April 24: Received and filed brief on behalf of Delaware Trust Company, Trustee, appellee.
- I. 1956, May 1: Received and filed brief of Wilmington Trust Company, Trustee.
- [fol. C] J. 1956, June 26: Received and filed brief on behalf of Edwin D. Steel, Jr., Guardian ad litem for Joseph Donner Winsor, et al.

- K. 1956, July 18: Received and filed reply brief of appellants.
- L. 1956, August 20: Received and filed order of Court assigning Associate Judge Caleb R. Layton, III, to fill up the number of the Court, the Chief Justice having disqualified himself. Notice sent to counsel.
- M. 1956, September 5: Received and filed order rescinding the assignment of Judge Caleb R. Layton, 3rd, and naming Judge James B. Carey to fill up the number of the Court. Copy of order to Judges and counsel.
- 1956, September 10: Hearing held.
- N. 1956, November 9: Received and filed motion to remand cause to Court below.
- O. 1956, November 15: Received and filed stipulation pertaining to remand, and order thereon dated November 13, 1956. Counsel notified.
- P. 1956, December 26: Received and filed stipulation pertaining to Florida order denying petition for rehearing and order granting stay.
- Q. 1957, January 16: Received and filed opinion dated January 14, 1957.
- R. 1957, January 25: Received and filed petition for reargument, or in the alternative, a petition for stay of mandate.
- S. 1957, February 8: Received and filed order denying petition for reargument, and staying the mandate for a period of 90 days. Counsel notified.

d

[fol. D] Clerk's Certificate to foregoing paper omitted in printing.

[fol. E] IN THE SUPREME COURT OF THE STATE OF DELAWARE

[Title omitted]

Appeal from the Court of Chancery of the State of Delaware in and for New Castle County, Civil Action No. 531

[fol. F] PRAECIPE—February 14, 1956

To:

T. EDGAR TOWNSEND

Clerk of the Supreme Court of the State of Delaware
Dover, Delaware:

Dora Stewart Lewis, Mary Washington Stewart Borie and Paula Browning Denckla, Defendants Below, Appellants, hereby appeal from all of the Judgment of the Court of Chancery of the State of Delaware in and for New Castle County dated the 13th day of January, A.D. 1956, and also appeal from all of the Order of said Court dated the 25th [fol. G] day of January, A.D. 1956, denying the motion of these appellants for a new trial, both of which were entered in Civil Action Number 531 and hereby direct you to issue writs, to be served either personally or by registered mail, viz., (1) a writ (to be called the citation) directing the appellees to defend the cause, and (2) a writ (to be called the writ of error), directed to the clerk of the court below, requiring the return to the Supreme Court of the State of Delaware of the record of the cause below. There are set forth below the names and addresses of the attorneys of record for the appellees who have appeared by attorneys and the last known post office address of such appellees who have no attorney of record.

William H. Foulk, Esquire,
William Duffy, Jr., Esquire,
Attorneys for Plaintiff,
Elizabeth Donner Hanson,
228 Delaware Trust Building
Wilmington, Delaware;

Caleb S. Layton, Esquire,
Attorney for Defendant,
Wilmington Trust Company, Trustee,
4072 duPont Building
Wilmington, Delaware;

David F. Anderson, Esquire,
Attorney for Defendant,
Delaware Trust Company, Trustee,
948 Delaware Trust Building
Wilmington, Delaware;

Robert B. Walls, Esquire,
Guardian ad litem for Dorothy
B. R. Stewart and William Donner
Denckla,
500 Industrial Trust Building,
Wilmington, Delaware;

[fol. H] Edwin D. Steel, Jr., Esquire,
Guardian ad litem for Joseph
Donner Winsor, Curtin Winsor,
Jr., and Donner Hanson;
3108 duPont Building
Wilmington, Delaware;

Katherine N. R. Denckla
Hobe Sound
Florida

Elwyn L. Middleton, Esquire,
Guardian of the property of
Dorothy B. R. Stewart, a
mentally ill person,
Harvey Building
Post Office Box 1391
West Palm Beach, Florida;

Bryn Mawr Hospital
Bryn Mawr, Pennsylvania;

Miriam V. Moyer
1710 Fidelity-Philadelphia Bldg.
Philadelphia, Pennsylvania;

James Smith
221 Williams Street
Rosemont, Pennsylvania;

Walter Hamilton
Rosemont
Pennsylvania;

Dorothy A. Doyle
5108 Penn Street
Philadelphia 24, Pennsylvania;

Ruth Brenner
4224 Osage Avenue
Philadelphia 4, Pennsylvania;

Mary Clackens
4930 Westminster Avenue
Philadelphia 31, Pennsylvania;

Louisville Trust Company,
Trustee for Benedict H. Hanson,
and Trustee under agreements
with William H. Donner,
Louisville
Kentucky;

[fol. 1] William Donner Roosevelt
2540 South Ocean Blvd.
Palm Beach, Florida;

John Stewart
Beechwood Road
Rosemont, Pennsylvania;

Benedict H. Hanson
510 Park Avenue
New York City, New York.

Dated: February 14, 1956.

/s/ Arthur G. Logan

/s/ Aubrey B. Lank

Attorneys for Dora Stewart Lewis,
Mary Washington Stewart Borie and
Paula Browning Denckla, Defendants
Below, Appellants,
400 Continental American Building
Wilmington, Delaware.

[fol. J]

IN THE SUPREME COURT OF THE
STATE OF DELAWARE
CITATIONS AND SHERIFF'S RETURNS

ALLEN J. COOK
SHERIFF OF KENT COUNTY
DOVER, DELAWARE

March 6, 1956

Mr. T. E. Townsend, Jr.
Clerk
Supreme Court
State House

Dear Sir,

Personal service made on persons available. Others made by return-register mail and returns received from all except Katherine N. R. Denckla, Hobe Sound, Florida; and one, Ruth Brenner, 4224 Osage Avenue, Philadelphia 4, Pennsylvania returned unclaimed.

Very truly yours,

s/ ALLEN J. COOK
Sheriff of Kent County

[fol. K]

CITATION

State of Delaware,

To The Sheriff of Kent County, Greeting:

We command you that, in accordance with the Rules of this Court, you cite Benedict H. Hanson to defend the appeal taken by Dora Stewart Lewis, Mary Washington Stewart Borie and Paula Browning Denckla from a certain judgment or decree entered against the said Dora Stewart Lewis, Mary Washington Stewart Borie and Paula Browning Denckla in a certain action before the Chancery Court in and for New Castle County, wherein Elizabeth Donner Hanson, as Executrix and Trustee under the Last Will of Dora Browning Donner, deceased, was plaintiff and the said Dora Stewart Lewis, et al. were defendants; and this you

h

are not to omit; and you are to make return of this citation within twenty days of the date hereof.

Witness the Honorable Clarence A. Southerland, our Chief Justice, at Dover the 3rd day of January, A.D. 1956.

Dated February 15, 1956.

T. E. Townsend, Jr., Clerk of the Supreme Court.
(Seal)

[fol. L] Served the within Citation by return registered mail upon Benedict H. Hanson on the 16th day of February A. D. 1956. Return received the 18th day of February.

Costs \$.97

Allen J. Cook, Sheriff of Kent County.

[fol. M] CITATION

State of Delaware,

To The Sheriff of Kent County, Greeting:

We command you that, in accordance with the Rules of this Court, you cite John Stewart to defend the appeal taken by Dora Stewart Lewis, Mary Washington Stewart Borie and Paula Browning Denckla from a certain judgment or decree entered against the said Dora Stewart Lewis, Mary Washington Stewart Borie and Paula Browning Denckla

in a certain action before the Chancery Court in and for New Castle County, wherein Elizabeth Donner Hanson, as Executrix and Trustee under the Last Will of Dora Browning Donner, deceased, was plaintiff and the said Dora Stewart Lewis, et al. were defendants; and this you are not to omit; and you are to make return of this citation within twenty days of the date hereof.

Witness the Honorable Clarence A. Southerland, our Chief Justice, at Dover the 3rd day of January, A.D. 1956.

Dated February 15, 1956.

T. E. Townsend, Jr., Clerk of the Supreme Court.
(Seal)

i
[fol. N] Served the within Citation by return, registered mail upon John Stewart on the 16th day of February A. D. 1956. Return received the 17th day of February A. D. 1956.

Costs \$.97

Allen J. Cook, Sheriff of Kent County.

[fol. O]

CITATION

State of Delaware,

To The Sheriff of Kent County, Greeting:

We command you that, in accordance with the Rules of this Court, you cite William Donner Roosevelt to defend the appeal taken by Dora Stewart Lewis, Mary Washington Stewart Borie and Paula Browning Denckla from a certain judgment or decree entered against the said Dora Stewart Lewis, Mary Washington Stewart Borie and Paula Browning Denckla

in a certain action before the Chancery Court in and for New Castle County, wherein Elizabeth Donner Hanson, as Executrix and Trustee under the Last Will of Dora Browning Donner, deceased, was plaintiff and the said Dora Stewart Lewis, et al. were defendants; and this you are not to omit, and you are to make return of this citation within twenty days of the date hereof.

Witness the Honorable Clarence A. Southerland, our Chief Justice, at Dover the 3rd day of January, A.D. 1956.

Dated February 15, 1956.

T. E. Townsend, Jr., Clerk of the Supreme Court.

(Seal)

[fol. P] Served the within Citation by return, registered mail upon William Donner Roosevelt on the 16th day of February A. D. 1956. Return received the 19th day of February A. D. 1956.

Costs \$.97

Allen J. Cook, Sheriff of Kent County.

[fol. Q]

CITATION

State of Delaware,

To The Sheriff of Kent County, Greeting:

We command you that, in accordance with the Rules of this Court, you cite Louisville Trust Company, a Kentucky corporation, as Trustee for Benedict H. Hanson, and as Trustee under agreements with William H. Donner to defend the appeal taken by Dora Stewart Lewis, Mary Washington Stewart Borie and Paula Browning Denckla from a certain judgment or decree entered against the said

.....

in a certain action before the Chancery Court in and for New Castle County, wherein Elizabeth Donner Hanson, as Executrix and Trustee under the Last Will of Dora Browning Donner, deceased, was plaintiff and the said Dora Stewart Lewis, et al. were defendants; and this you are not to omit; and you are to make return of this citation within twenty days of the date hereof.

Witness the Honorable Clarence A. Southerland, our Chief Justice, at Dover the 3rd day of January, A.D. 1956.

Dated February 15, 1956.

T. E. Townsend, Jr., Clerk of the Supreme Court.

(Seal)

[fol. R] Served the within Citation by return registered mail upon Louisville Trust Company on the 16th day of February A. D. 1956. Return received the 18th day of February A. D. 1956.

Costs \$.97

Allen J. Cook, Sheriff of Kent County.

[fol. S]

CITATION

State of Delaware,

To The Sheriff of Kent County, Greeting:

We command you that, in accordance with the Rules of this Court, you cite Mary Glackens to defend the appeal taken by Dora Stewart Lewis, Mary Washington Stewart Borie and Paula Browning Denckla from a certain judgment or decree entered against the said Dora Stewart Lewis, Mary Washington Stewart Borie and Paula Browning Denckla

in a certain action before the Chancery Court in and for New Castle County, wherein Elizabeth Donner Hanson, as Executrix and Trustee under the Last Will of Dora Browning Donner, deceased, was plaintiff and the said Dora Stewart Lewis, et al. were defendants; and this you are not to omit; and you are to make return of this citation within twenty days of the date hereof.

Witness the Honorable Clarence A. Southerland, our Chief Justice, at Dover the 3rd day of January, A.D. 1956.

Dated February 15, 1956.

T. E. Townsend, Jr., Clerk of the Supreme Court.

(Seal)

[fol. T] Served the within Citation by return registered mail upon Mary Glackens on the 16th day of February A. D. 1956. Return received this 21st day of February A. D. 1956.

Costs \$.97

Allen J. Cook, Sheriff of Kent County.

1
[fol. U]

CITATION

State of Delaware,

To The Sheriff of Kent County, Greeting:

We command you that, in accordance with the Rules of this Court, you cite Ruth Brenner to defend the appeal taken by Dora Stewart Lewis, Mary Washington Stewart Borie and Paula Browning Denckla from a certain judgment or decree entered against the said Dora Stewart Lewis, Mary Washington Stewart Borie and Paula Browning Denckla

in a certain action before the Chancery Court in and for New Castle County, wherein the said Elizabeth Donner Hanson, as Executrix and Trustee under the Last Will of Dora Browning Donner, deceased, was plaintiff and the said Dora Stewart Lewis, et al. were defendants; and this you are not to omit; and you are to make return of this citation within twenty days of the date hereof.

Witness the Honorable Clarence A. Southerland, our Chief Justice, at Dover the 3rd day of January, A.D. 1956.

Dated February 15, 1956.

T. E. Townsend, Jr., Clerk of the Supreme Court.

(Seal)

[fol. V] Registered Letter sent to Ruth Brenner on the 16th day of February A. D. 1956. Return unclaimed this 1st day of March A. D. 1956.

Costs \$.97

Allen J. Cook, Sheriff of Kent County.

[fol. W]

CITATION

State of Delaware,

To The Sheriff of Kent County, Greeting:

We command you that, in accordance with the Rules of this Court, you cite Dorothy A. Doyle to defend the appeal taken by Dora Stewart Lewis, Mary Washington Stewart Borie and Paula Browning Denckla from a certain judgment or decree entered against the said Dora Stewart Lewis, Mary Washington Stewart Borie and Paula Browning Denckla in a certain action before the Chancery Court in and for New Castle County, wherein Elizabeth Donner Hanson, as Executrix and Trustee under the Last Will of Dora Browning Donner, deceased, was plaintiff and the said Dora Stewart Lewis, et al. were defendants; and this you are not to omit; and you are to make return of this citation within twenty days of the date hereof.

Witness the Honorable Clarence A. Southerland, our Chief Justice, at Dover the 3rd day of January, A.D. 1956.

Dated February 15, 1956.

T. E. Townsend, Jr., Clerk of the Supreme Court.

(Seal)

[fol. X] Served the within Citation by return registered mail upon Dorothy A. Doyle on the 16th day of February A. D. 1956. Return received the 18th day of February A. D. 1956.

Costs \$.97

Allen J. Cook, Sheriff of Kent County.

[fol. Y]

CITATION

State of Delaware,

To The Sheriff of Kent County, Greeting:

We command you that, in accordance with the Rules of this Court, you cite Walter Hamilton to defend the appeal taken by Dora Stewart Lewis, Mary Washington Stewart Borie and Paula Browning Denckla from a certain judgment or decree entered against the said Dora Stewart Lewis, Mary Washington Stewart Borie and Paula Browning Denckla

in a certain action before the Chancery Court in and for New Castle County, wherein Elizabeth Donner Hanson, as Executrix and Trustee under the Last Will of Dora Browning Donner, deceased, was plaintiff and the said Dora Stewart Lewis, et al. were defendants; and this you are not to omit; and you are to make return of this citation within twenty days of the date hereof.

Witness the Honorable Clarence A. Southerland, our Chief Justice, at Dover the 3rd day of January, A.D. 1956.

Dated February 15, 1956.

T. E. Townsend, Jr., Clerk of the Supreme Court.

(Seal)

[fol. Z] Served the within Citation by return registered mail upon Walter Hamilton on the 16th day of February A. D. 1956. Return received the 1st day of March A. D. 1956.

Costs \$.97

Allen J. Cook, Sheriff of Kent County.

[fol. AA]

CITATION

State of Delaware,

To The Sheriff of Kent County, Greeting:

We command you that, in accordance with the Rules of this Court, you cite James Smith to defend the appeal taken by Dora Stewart Lewis, Mary Washington Stewart Borie and Paula Browning Denekla from a certain judgment or decree entered against the said Dora Stewart Lewis, Mary Washington Stewart Borie and Paula Browning Denekla

in a certain action, before the Chancery Court in and for New Castle County, wherein Elizabeth Donner Hanson, as Executrix and Trustee under the Last Will of Dora Browning Donner, deceased, was plaintiff and the said Dora Stewart Lewis, et al. were defendants; and this you are not to omit; and you are to make return of this citation within twenty days of the date hereof.

Witness the Honorable Clarence A. Southerland, our Chief Justice, at Dover the 3rd day of January, A.D. 1956.

Dated February 15, 1956.

T. E. Townsend, Jr., Clerk of the Supreme Court.

(Seal)

[fol. BB] Served the within Citation by return, registered mail upon James Smith on the 16th day of February A. D. 1956. Return received the 17th day of February A. D. 1956.

Costs \$.97

Allen J. Cook, Sheriff of Kent County.

[fol. CC]

CITATION

State of Delaware,

To The Sheriff of Kent County, Greeting:

We command you that, in accordance with the Rules of this Court, you cite Miriam V. Moyer to defend the appeal taken by Dora Stewart Lewis, Mary Washington Stewart Borie and Paula Browning Denckla from a certain judgment or decree entered against the said Dora Stewart Lewis, Mary Washington Stewart Borie and Paula Browning Denckla in a certain action before the Chancery Court in and for New Castle County, wherein Elizabeth Donner Hanson, as Executrix and Trustee under the Last Will of Dora Browning Donner, deceased, was plaintiff and the said Dora Stewart Lewis, et al. were defendants; and this you are not to omit; and you are to make return of this citation within twenty days of the date hereof.

Witness the Honorable Clarence A. Southerland, our Chief Justice, at Dover the 3rd day of January, A.D. 1956.

Dated February 15, 1956.

T. E. Townsend, Jr., Clerk of the Supreme Court.

(Seal)

[fol. DD] Served the within Citation by return, registered mail upon Miriam V. Moyer on the 16th day of February A. D. 1956. Return received the 18th day of February A. D. 1956.

Costs \$97

Allen J. Cook, Sheriff of Kent County.

[fol. EE]

CITATION

State of Delaware,

To The Sheriff of Kent County, Greeting:

We command you that, in accordance with the Rules of this Court, you cite Bryn Mawr Hospital, a Pennsylvania corporation, to defend the appeal taken by Dora Stewart Lewis, Mary Washington Stewart Borie and Paula Browning Denekla from a certain judgment or decree entered against the said Dora Stewart Lewis, Mary Washington Stewart Borie and Paula Browning Denekla

in a certain action before the Chancery Court in and for New Castle County, wherein Elizabeth Donner Hanson, as Executrix and Trustee under the Last Will of Dora Browning Donner, deceased, was plaintiff and the said Dora Stewart Lewis, et al. were defendants; and this you are not to omit; and you are to make return of this citation within twenty days of the date hereof.

Witness the Honorable Clarence A. Southerland, our Chief Justice, at Dover the 3rd day of January, A.D. 1956.

Dated February 15, 1956.

T. E. Townsend, Jr., Clerk of the Supreme Court.

(Seal)

[fol. FF] Served the within Citation by return registered mail upon Bryn Mawr Hospital on the 16th day of February A. D. 1956. Return received the 18th day of February A. D. 1956.

Costs \$.97

Allen J. Cook, Sheriff of Kent County.

[fol. GG]

CITATION

State of Delaware,

To The Sheriff of Kent County, Greeting:

We command you that, in accordance with the Rules of this Court, you cite Elwyn L. Middleton, Guardian of the property of Dorothy B. R. Stewart, a mentally ill person to defend the appeal taken by Dora Stewart Lewis, Mary Washington Stewart Borie and Paula Browning Denckla from a certain judgment or decree entered against the said Dora Stewart Lewis, Mary Washington Stewart Borie and Paula Browning Denckla

in a certain action before the Chancery Court in and for New Castle County, wherein Elizabeth Donner Hanson, as Executrix and Trustee under the Last Will of Dora Browning Donner, deceased, was plaintiff and the said Dora Stewart Lewis, et al. were defendants; and this you are not to omit; and you are to make return of this citation within twenty days of the date hereof.

Witness the Honorable Clarence A. Southerland, our Chief Justice, at Dover the 3rd day of January, A.D. 1956.

Dated February 15, 1956.

T. E. Townsend, Jr., Clerk of the Supreme Court.

(Seal)

[fol. HH] Served the within Citation by return, registered mail upon Elwyn L. Middleton, Guardian of the property of Dorothy B. R. Stewart, a mentally ill person, on the 16th day of Feb. A. D. 1956. Return recieved on the 20th day of February A. D. 1956.

Costs \$.97

Allen J. Cook, Sheriff of Kent County.

[fol. II]

CITATION

State of Delaware,

To The Sheriff of Kent County, Greeting:

We command you that, in accordance with the Rules of this Court, you cite Katherine N. R. Denckla to defend the appeal taken by Dora Stewart Lewis, Mary Washington Stewart Borie and Paula Browning Denckla from a certain judgment or decree entered against the said Dora Stewart Lewis, Mary Washington Stewart Borie and Paula Browning Denckla

in a certain action before the Chancery Court in and for New Castle County, wherein Elizabeth Donner Hanson, as Executrix and Trustee under the Last Will of Dora Browning Donner, deceased, was plaintiff and the said Dora Stewart Lewis, et al. were defendants; and this you are not to omit; and you are to make return of this citation within twenty days of the date hereof.

Witness the Honorable Clarence A. Southerland, our Chief Justice, at Dover the 3rd day of January, A.D. 1956.

Dated February 15, 1956.

T. E. Townsend, Jr., Clerk of the Supreme Court.

(Seal).

[fol. JJ] Registered letter sent to Katherine N. R. Denckla on the 16th day of February A. D. 1956. No return received.

Costs \$.97

Allen J. Cook, Sheriff of Kent County.

t
[fol. KK]

WRIT OF ERROR

State of Delaware,

To Robert A. Stevenson, Register in Chancery of New Castle County, Greetings;

Whereas Dora Stewart Lewis, Mary Washington Stewart Borie and Paula Browning Denckla, the defendants in a certain action in the Court of Chancery in and for New Castle County, wherein Elizabeth Donner Hanson, as Executrix and Trustee under the Last Will of Dora Browning Donner, deceased, is the plaintiff, being Civil Action No. 531, 19....., has alleged that

there is error in the record and proceedings in said action:

Therefore, We, in order to correct the error or errors, if any there be, and to do justice between the parties, Do Hereby Command You, that you send to this Court within 10 days from the service of this writ upon you, the record in said action as defined in the Rules of this Court, certifying under your hand and the Seal of your Court the correctness of the said record.

Witness the Honorable Clarence A. Southerland, our Chief Justice, at Dover, the 3rd day of January, A.D. 1956.

Dated February 15, 1956.

T. E. Townsend, Jr., Clerk of the Supreme Court.

(Seal)

[fol. LL] Service accepted this 16th day of February, A. D. 1956.

Howard T. Atkinson, Deputy Register

Served the within Writ of Error upon Robert A. Stevenson, Register in Chancery by leaving a true copy of the within Writ in the hands of Howard T. Atkinson, Deputy Register this 16th day of February A. D. 1956.

Costs \$10.00

Allen J. Cook, Sheriff of Kent County.

[fol. MM]

CITATION

State of Delaware,

To The Sheriff of Kent County, Greeting:

We command you that, in accordance with the Rules of this Court, you cite Robert B. Walls, Esquire, Guardian ad litem for Dorothy B. R. Stewart and William Donner Denckla to defend the appeal taken by Dora Stewart Lewis, Mary Washington Stewart Borie and Paula Browning Denckla from a certain judgment or decree entered against the said Dora Stewart Lewis, Mary Washington Stewart Borie and Paula Browning Denckla

in a certain action before the Chancery Court in and for New Castle County, wherein Elizabeth Donner Hanson, as Executrix and Trustee under the Last Will of Dora Browning Donner, Deceased, was plaintiff and the said Dora Stewart Lewis, et al. were defendants; and this you are not to omit; and you are to make return of this citation within twenty days of the date hereof.

Witness the Honorable Clarence A. Southerland, our Chief Justice, at Dover the 3rd day of January, A.D. 1956.

Dated February 15, 1956:

T. E. Townsend, Jr., Clerk of the Supreme Court.

(Seal)

[fol. NN]. Service accepted this 16th day of February A. D. 1956.

Robert B. Walls, Jr. per David B. Cox, Jr.

Served the within Citation upon Robert B. Walls, Guardian ad litem for Dorothy B. R. Stewart and William Donner Denckla by leaving a true copy of the within Citation in the hands of David B. Cox, Jr., this 16th day of February A. D. 1956.

Costs \$1.00

Allen J. Cook, Sheriff of Kent County.

[fol. 00]

CITATION

State of Delaware,

To The Sheriff of Kent County, Greeting:

We command you that, in accordance with the Rules of this Court, you cite Wilmington Trust Company, a Delaware corporation, as Trustee under three separate Agreements, (1) and (2) with William H. Donner dated March 18, 1932 and March 19, 1932, and (3) with Dora Browning Donner dated March 25, 1935, to defend the appeal taken by Dora Stewart Lewis, Mary Washington Stewart Borie and Paula Browning Denckla from a certain judgment or decree entered against the said Dora Stewart Lewis, Mary Washington Stewart Borie and Paula Browning Denckla

in a certain action before the Chancery Court in and for New Castle County, wherein Elizabeth Donner Hanson, as Executrix and Trustee under the Last Will of Dora Browning Donner, deceased, was plaintiff and the said Dora Stewart Lewis, et al. were defendants; and this you are not to omit; and you are to make return of this citation within twenty days of the date hereof.

Witness the Honorable Clarence A. Southerland, our Chief Justice, at Dover the 3rd day of January, A.D. 1956.

Dated February 15, 1956.

T. E. Townsend, Jr., Clerk of the Supreme Court.

(Seal)

[fol. PP] Service accepted this 16th day of February A. D. 1956.

C. S. Layton, Atty. for Wilmington Trust Co.

Served the within citation upon Wilmington Trust Company, as Trustee, by leaving a true copy of the within Citation in the hands of Caleb S. Layton, this 16th day of February A. D. 1956.

Costs \$1.00

Allen J. Cook, Sheriff of Kent County.

[fol. QQ]

CITATION

State of Delaware,

To The Sheriff of Kent County, Greeting:

We command you that, in accordance with the Rules of this Court, you cite Delaware Trust Company, a Delaware corporation, as Trustee, under three separate Agreements, (1) with William H. Donner dated August 6, 1946, and (2) and (3) with Elizabeth Donner Hanson, both dated November 26, 1948 to defend the appeal taken by Dora Stewart Lewis, Mary Washington Stewart Borie and Paula Browning Denckla from a certain judgment or decree entered against the said Dora Stewart Lewis, Mary Washington Stewart Borie and Paula Browning Denckla

in a certain action before the Chancery Court in and for New Castle County, wherein Elizabeth Donner Hanson, as Executrix and Trustee under the Last Will of Dora Browning Donner, deceased, was plaintiff and the said Dora Stewart Lewis, et al. were defendants; and this you are not to omit; and you are to make return of this citation within twenty days of the date hereof.

Witness the Honorable Clarence A. Southerland, our Chief Justice, at Dover the 3rd day of January, A.D. 1956.

Dated February 15, 1956.

T. E. Townsend, Jr., Clerk of the Supreme Court.

(Seal)

[fol. RR] Service accepted this 16th day of February A. D. 1956.

David F. Anderson, Attorney for Delaware Trust Company, Trustee.

Served the within Citation upon Wilmington Trust Company as Trustee by leaving a true copy of the within Citation in the hands of David F. Anderson, this 16th day of February A. D. 1956.

Costs \$1.00

Allen J. Cook, Sheriff of Kent County.

[fol. SS]

CITATION

State of Delaware,

To The Sheriff of Kent County, Greeting:

We command you that, in accordance with the Rules of this Court, you cite Edwin D. Steel, Jr., Esquire, Guardian ad litem for Joseph Donner Winsor, Curtin Winsor Jr., and Donner Hanson to defend the appeal taken by Dora Stewart Lewis, Mary Washington Stewart Borie and Paula Browning Denckla from a certain judgment or decree entered against the said Dora Stewart Lewis, Mary Washington Stewart Borie and Paula Browning Denckla

in a certain action before the Chancery Court in and for New Castle County, wherein Elizabeth Donner Hanson, as Executrix and Trustee under the Last Will of Dora Browning Donner, deceased, was plaintiff and the said Dora Stewart Lewis, et al. were defendants; and this you are not to omit; and you are to make return of this citation within twenty days of the date hereof.

Witness the Honorable Clarence A. Southerland, our Chief Justice, at Dover the 3rd day of January, A.D. 1956.

Dated February 15, 1956.

T. E. Townsend, Jr., Clerk of the Supreme Court.

(Seal)

[fol. TT] Service accepted this 16th day of February A. D. 1956.

Edwin D. Steel, Jr.

Served the within Citation upon Edwin D. Steele, Jr., Guardian ad litem for Joseph Donner Winsor, Curtin Winsor, Jr., and Donner Hanson, by leaving in his hands a true copy of the within Citation this 16th day of February A. D. 1956.

Costs \$1.00

Allen J. Cook, Sheriff of Kent County.

[fol. UU]

CITATION

State of Delaware,

To The Sheriff of Kent County, Greeting:

We command you that, in accordance with the Rules of this Court, you cite Elizabeth Donner Hanson, as Executrix and Trustee under the Last Will of Dora Browning Donner, deceased to defend the appeal taken by Dora Stewart Lewis, Mary Washington Stewart Borie and Paula Browning Denckla from a certain judgment or decree entered against the said Dora Stewart Lewis, Mary Washington Stewart Borie and Paula Browning Denckla

in a certain action before the Chancery Court in and for New Castle County, wherein the said Elizabeth Donner Hanson was plaintiff and the said Dora Stewart Lewis, et al. were defendants; and this you are not to omit; and you are to make return of this citation within twenty days of the date hereof.

Witness the Honorable Clarence A. Southerland, our Chief Justice, at Dover the 3rd day of January, A.D. 1956.

Dated February 15, 1956.

T. E. Townsend, Jr., Clerk of the Supreme Court.

(Seal).

[fol. VV] Service made this 16th day of February A. D. 1956.

Wm. H. Foulk, Wm. Duffy, Jr., Attorneys for Pltf.
below.

Served the within Citation upon Elizabeth Donner Hanson as Executrix and Trustee by leaving a true copy of the within Citation in the hands of William H. Faulk and William Duffy, Jr. attorneys for Plaintiff this 16th day of February A. D. 1956.

Costs \$1.00

Allen J. Cook, Sheriff of Kent County.

TURN TO NEXT CARD

Supreme Court of the State of Delaware

DORA STEWART LEWIS, MARY
WASHINGTON STEWART
BORIE and PAULA BROWNING
DENCKLA,

Defendants Below, Appellants.

ELIZABETH DONNER HANSON, as
Executrix and Trustee under the last
Will of Dora Browning Donner,
ceased,

Plaintiff Below, Appellee.

WILMINGTON TRUST COMPANY, a
Delaware corporation, as Trustee under
three separate Agreements, (1) and (2)
with William H. Donner dated March
18, 1932 and March 19, 1932, and (3)
with Dora Browning Donner dated
March 25, 1935, et al.,

Defendants Below, Appellees.

No. 8, 1956.

Appeal from the Court of
Chancery of the State of
Delaware in and for New
Castle County, Civil Action
No. 531.

APPELLANTS' APPENDIX.

ARTHUR G. LOGAN,

AUBREY B. LANK,

Continental American Bldg.,
Wilmington, Delaware,

*Attorney for Appellants, Dora
Stewart Lewis, Mary Washing-
ton Stewart Borie and Paula
Browning Denckla.*

ROBERT B. WALLS, JR.,

Industrial Trust Bldg.,
Wilmington, Delaware,

*Guardian ad litem for Dorothy
B. R. Stewart and William
Donner Denckla.*

Note:

**Appellants' Appendix is
bound in as a part of the
Transcript of Record.**

TABLE OF CONTENTS OF APPELLANT'S APPENDIX.

	Page
Relevant Docket Entries	A1
Complaint for Declaratory Judgment	A3
Exhibit A	A14
Exhibit B	A21
Exhibit C	A30
Exhibit D	A35
Exhibit E	A39
Exhibit F	A45
Answer of Wilmington Trust Company, Trustee	A47
Answer of Delaware Trust Company	A49
Answer of Edwin D. Steel, Jr., Guardian Ad Litem for Joseph Donner Winsor and Donner Hanson	A50
Answer of Robert B. Walls, Jr., Guardian Ad Litem for Dorothy B. R. Stewart, a Mentally Ill Person, and for William Donner Denckla and Curtis Winsor, Jr., Infants	A54
Motion for Summary Judgment	A58
Answer of Defendants Dora Stewart Lewis, Mary Washington Stewart Borie, and Paula Browning Denckla	A60
Complaint Filed in Florida	A70
Florida Summary Final Decree	A83
Excerpts from Affidavit of Manley P. Caldwell (Dated March 30, 1955)	A86
Excerpts from Affidavit of John N. Farrell (Dated April 18, 1955)	A87
Affidavit of Joseph W. Chin, Jr. (Filed November 18, 1954)	A89
Exhibit A	A96
Exhibit B	A96
Exhibit C	A97
Exhibit D	A98
Exhibit E	A100
Exhibit F	A103
Exhibit G	A104
Exhibit H	A104
Exhibit I	A105

TABLE OF CONTENTS OF APPELLANT'S APPENDIX (Continued).

	Page
Excerpts from Affidavit of C. Kenneth Baxter (Dated November 12, 1954)	A110
Excerpts from Deposition of the Witness George P. Bissell, Jr., Taken by Marvel Defendants (December 28, 1954)	A114
George P. Bissell, Jr.—	
Direct Examination	A114
Cross-Examination	A126
Redirect Examination	A129
Exhibit A to Bissell, Deposition	A132-1
Excerpts from Deposition of the Witness Bye, Taken by Marvel Defendants (December 28, 1954)	A135
Robert C. Bye—	
Direct Examination	A133
Excerpts from Deposition of the Witness Fairman, Taken by Marvel Defendants (December 28, 1954)	A139
Endsley P. Fairman—	
Direct Examination	A139
Cross-Examination	A146
Redirect Examination	A147
Excerpts from Deposition of the Witness Bradford, Taken by the Marvel Defendants (December 28, 1954)	A148
William Bradford, Jr.—	
Direct Examination	A148
Excerpts from Deposition of the Witness Bancroft, Taken by the Marvel Defendants (December 28, 1954)	A153
J. Sellers Bancroft—	
Direct Examination	A153
Cross-Examination	A155
Affidavit of C. Kenneth Baxter (Dated December 27, 1954)	A157
Affidavit of John Stewart (Dated December 14, 1954)	A163
Affidavit of John E. Hairsine (Dated January 6, 1955)	A167
Affidavit of C. Robert Burns (Dated December 17, 1954)	A170
Excerpts from Affidavit of Elwyn L. Middleton (Dated September 3, 1954)	A172
Opinion (Filed December 29, 1955 (119 A. 2d 901))	A173
Judgment	A191
Motion for a New Trial (Filed January 20, 1956)	A199
Order (Filed January 25, 1956)	A202

APPELLANT'S APPENDIX.

RELEVANT DOCKET ENTRIES.

- # 1 JULY 28, A.D. 1954—COMPLAINT FOR DECLARATORY JUDGMENT
- # 7 Aug. 13, A.D. 1954—Answer of Wilmington Trust Company, Trustee.
* * *
- # 9 Aug. 26, A.D. 1954—Answer of Delaware Trust Company, as Trustee above named as one of the Defendants.
* * *
- # 12 Sept. 2, A.D. 1954—Answer of Edwin D. Steel, Jr. Guardian Ad Litem for Joseph Donner Winsor and Donner Hanson.
* * *
- # 17 Nov. 18, A.D. 1954—Notice, Motion for Summary Judgment, Affidavits and other papers.
* * *
- # 24 Feb. 14, A.D. 1955—Answer of Robert B. Walls, Jr., Guardian Ad Litem for Dorothy B. R. Stewart, a mentally ill person, and for William Donner Denckla and Curtin Winsor, Jr., infants.
- # 40 July 19, A.D. 1955—Order appointing the Honorable Daniel L. Herrmann Acting Vice Chancellor.
- # 41 July 22, A.D. 1955—Answer of Defendants, Dora Stewart Lewis, Mary Washington Stewart Borie and Paula Browning Denckla, Counterclaim and Crossclaims.
- # 42 July 22, A.D. 1955—Motion for Summary Judgment.

- # 43 Aug. 9, A.D. 1955—Answer of Wilmington Trust Company, Trustee, to the Cross-claim of Dora Stewart Lewis, Mary Washington Stewart Borie and Paul Browning Denckla.
- # 44 Aug. 9, A.D. 1955—Answer of Delaware Trust Company, Trustee, one of the Defendants to the Cross-Claims asserted in the Answer of Defendants Dora Stewart Lewis, Mary Washington Stewart Borie and Paula Browning Denckla.
- * * *
- # 46 Aug. 16, A.D. 1955—Notice and Motion for Summary Judgment.
- # 60 Sept. 29, A.D. 1955—Notice, Stipulation and Order Approving Stipulation as to Representation of Curtin Winsor, Jr. /
- * * *
- # 68 Dec. 28, A.D. 1955—Opinion of Acting Vice Chancellor Herrmann Based on Briefs and Argument
- # 69 Jan. 13, A.D. 1956—Judgment.
- # 70 Jan. 20, A.D. 1956—Notice and Motion for New Trial.
- # 71 Jan. 25, A.D. 1956—Order Denying Motion for New Trial.
- # 72 Feb. 16, A.D. 1956—Application of Robert B. Walls, Jr., Guardian Ad Litem, for Leave to Participate in Appeal to Supreme Court and Order Signed by Acting Vice Chancellor, D. L. Herrmann.
- # 73 Feb. 16, A.D. 1956—Writ of Error from the Supreme Court.

COMPLAINT FOR DECLARATORY JUDGMENT.**(Filed July 28, 1954.)**

1. Elizabeth Donner Hanson, the plaintiff, is Executrix of and Trustee under the will, dated December 3, 1949, of her mother. Dora Browning Donner, who died November 20, 1952 (a copy of said will is attached hereto, marked Exhibit A and made a part hereof). She was appointed Executrix by the County Judges' Court in and for Palm Beach County Florida, on December 23, 1952, and duly qualified thereafter.

2. Wilmington Trust Company is a Delaware corporation engaged in banking, with principal offices at Tenth and Market Streets, Wilmington, Delaware. It is Trustee under three separate agreements: (1) and (2) with William H. Donner dated March 18, 1932 and March 19, 1932, and (3) with Dora Browning Donner dated March 25, 1935, designated Trust #2152 (a copy of said agreement is attached hereto, marked Exhibit B and made a part hereof).

3. Delaware Trust Company is a Delaware corporation engaged in banking, with principal offices at 900 Market Street, Wilmington, Delaware. It is Trustee under three separate agreements: (1) with William H. Donner dated August 6, 1940 for the benefit of Katherine N. R. Denckla, designated Trust #8555; and (2) and (3) with Elizabeth Donner Hanson each dated November 26, 1948, for the benefit of Joseph Donner Winsor and Donner Hanson, designated Trusts #9022 and #9023 respectively.

4. Katherine N. R. Denckla (sometimes known as Katherine N. R. Denckla Ordway), beneficiary under Trust designated #8555, resides at Hobe Sound, Florida.

5. Elwyn L. Middleton, residing at Harvey Building, West Palm Beach, Florida, was duly appointed guardian for Dorothy B. R. Stewart, a mentally ill person, by the County Judges' Court in and for Palm Beach County, Florida, on December 22, 1952. Dorothy B. R. Stewart is the beneficiary for life of a testamentary trust created by Paragraph Fifth (b) of the will of the said Dora Browning Donner; the plaintiff is designated as Trustee thereof to pay income to Dorothy B. R. Stewart as directed by Katherine N. R. Denckla.

6. Joseph Donner Winsor and Donner Hanson, beneficiaries under Trusts designated #9022 and #9023, respectively, as hereinbefore set forth in Paragraph 3, are minors, residing with their mother, Elizabeth Donner Hanson, at 2540 South Ocean Boulevard, Palm Beach, Florida.

7. The following defendants, all of whom are non-residents of the State of Delaware, were appointed under a power of appointment dated October 3, 1949 (a copy of which is attached hereto, marked Exhibit C and made a part hereof), exercised by Dora Browning Donner under trust dated March 25, 1935, designated Trust #2152, and, with the exception of Louisville Trust Company, Trustee for Benedict H. Hanson, which appointment was later revoked by appointment dated July 7, 1950 (a copy of which is attached hereto, marked Exhibit D and made a part hereof), have received the amounts appointed to them:

Bryn Mawr Hospital \$10,000.
Bryn Mawr, Pa.

Miriam V. Moyer 2,000.
1710 Fidelity-Philadelphia Bldg.
Philadelphia, Pa.

James Smith 1,000.
221 Williams St.
Rosemont, Pa.

Walter Hamilton 1,000.
Rosemont, Pa.

Dorothy A. Doyle
5108 Penn St.
Philadelphia 24, Pa.

Ruth Brenner
4224 Osage Avenue
Philadelphia 4, Pa.

Mary Glackens
4930 Westminster Ave.
Philadelphia 31, Pa.

Servants in employ-
ment for more than 1,000.

two years at time of

Dora Browning Donner's 1,000.
death.

Louisville Trust Company 10,000.
Louisville, Ky.
Trustee for Benedict H.
Hanson, 510 Park Ave.,
New York City, New York.

8. The following defendants, all of whom are non-residents of the State of Delaware, were appointed under two powers of appointment dated April 6, 1935-

(a copy of which is attached hereto, marked Exhibit E and made a part hereof), and October 11, 1939 (a copy of which is attached hereto, marked Exhibit F and made a part hereof), exercised by Dora Browning Donner under trust dated March 25, 1935, designated Trust #2152; all of said appointments were revoked by the terms of the said power of appointment dated December 3, 1949 (Exhibit C hereto), but the parties are joined so as to ~~permit adjudication~~ of any right which they may have under said trust:

(a) Louisville Trust Company, Louisville, Kentucky, Trustee under certain agreements with William H. Donner, by a power of appointment dated April 6, 1935, for the following persons in the amount of \$10,000 each:

Dora Stewart Lewis (Dora Browning Stewart)

7000 Glendale Ave.

Chevy Chase, Maryland

Mary Washington Stewart Borie (Mary Washington Stewart)

6912 Madisonville Rd.

Maremont, Cincinnati, Ohio

Paula Browning Denckla

Grubbs Mill Road

Berwyn, Pa.

William Donner Denckla

5 East 67th Street

New York, N.Y.

William Donner Roosevelt

2540 South Ocean Blvd.

Palm Beach, Florida

(b) Wilmington Trust Company, Wilmington, Delaware, in further trust under Trust #2152

by a power of appointment dated April 6, 1935, for afterborn grandchildren, who are as follows, in the amount of \$10,000 each:

Curtin Winsor, Jr.
2540 South Ocean Blvd.
Palm Beach, Florida

Joseph Denner Winsor
2540 South Ocean Blvd.
Palm Beach, Florida

Donner Hanson
2540 South Ocean Blvd.
Palm Beach, Florida

(c) Wilmington Trust Company, Wilmington, Delaware, Trustee under certain agreements with William H. Donner dated March 18, 1932, and March 19, 1932, for the benefit of Katherine N. R. Denckla and Dorothy B. R. Stewart, respectively, by a power of appointment dated April 6, 1935, each to receive one-half of the residue of said trust.

(d) John Stewart, of Beechwood Road, Rosemont, Pa., beneficiary in the amount of \$10,000 by a power of appointment dated April 6, 1935, and increased to \$15,000 by a power of appointment dated October 11, 1939.

9. Dora Browning Donner, while residing at Villanova, Pennsylvania, entered into the said trust agreement dated March 25, 1935, designated Trust #2152, with Wilmington Trust Company (Exhibit B hereto) whereby she provided as follows:

"Trustee shall pay over the net income of the trust fund unto Trustor, for and during the term of her natural life. Upon the death of

Trustor trustee shall assign, transfer, convey and deliver this trust fund, principal and undistributed income thereof, if any, free from this trust, unto such person or persons and in such manner and amounts and upon such trusts, terms and conditions as Trustor shall have appointed by the last instrument in writing which she shall have executed and delivered to Trustee, or failing such instrument, by her last Will and Testament, or in default of any such appointment then unto the then living issue of Trustor, per stirpes and not per capita."

This trust was accepted by Wilmington Trust Company at its principal offices in Wilmington, Delaware, at which place the principal securities listed in Schedule A of the agreement were delivered to it. Said Trustee has continued to administer the trust in accordance with the terms thereof since the date of its creation and has retained possession of the corpus of said trust in Delaware except as hereinafter set forth in Paragraph 15.

10. After the creation of said trust, Dora Browning Donner exercised her reserved power of appointment under date of April 6, 1935, by appointing \$5,000 to Bryn Mawr Hospital, \$10,000 to John Stewart, \$10,000 to each of her grandchildren, who are the persons hereinbefore set forth in Paragraphs 8 (a) and (b), and the balance to Wilmington Trust Company, in trust, one-half for the benefit of Katherine N. R. Denckla (named in the will of the said Dora Browning Donner as Katherine N. R. Denckla Ordway) and the other half for the benefit of the defendant, Dorothy B. R. Stewart, as hereinbefore set forth in Paragraph 8 (c).

11. Dora Browning Donner amended said appointment of April 6, 1935, by a further appointment dated October 11, 1939, which increased the amount appointed to John Stewart from \$10,000 to \$15,000, as hereinbefore set forth in Paragraph 8 (d), and appointed \$1,000 to James Smith.

12. By the terms of a power of appointment dated December 3, 1949 (Exhibit C hereto), Dora Browning Donner revoked all appointments made by her previous to that date, especially the appointment dated April 6, 1935, as altered, amended and modified by the appointment dated October 11, 1939, and appointed \$2,000 to Miriam V. Moyer; \$1,000 each to James Smith, Walter Hamilton, Dorothy A. Doyle, Ruth Brenner, and Mary Glackens; \$10,000 to Louisville Trust Company in trust for Benedict H. Hanson for life with remainder to Delaware Trust Company, Trustee under Trust #9023 for the benefit of Donner Hanson; \$10,000 to Bryn Mawr Hospital; and \$200,000 each to Delaware Trust Company as Trustee of Trusts #9022 for the benefit of Joseph Donner Winsor and #9023 for Donner Hanson, respectively; and the residue to the Executrix of her will, to be dealt with in accordance with the terms and conditions thereof.

13. The will of Dora Browning Donner dated December 3, 1949 (Paragraph Fifth of Exhibit A hereto) directs that her residuary estate be divided into two equal parts to be held as follows:

(a) One part to Delaware Trust Company, Trustee under an agreement with William H. Donner dated August 6, 1940 for the benefit of Katherine N. R. Denckla, designated Trust #8555.

(b) One part to the plaintiff, Elizabeth Donner Hanson, in trust, for the payment of so much

of the income and/or principal therefrom for the support and maintenance, benefit and/or comfort of Dorothy B. R. Stewart (whose guardian, Elwyn L. Middleton, is a defendant herein), in such amounts and at such times and in such manner as Katherine N. R. Denckla Ordway, defendant herein, shall direct; upon the death of the said Dorothy B. R. Stewart the remainder is to be paid over to Delaware Trust Company, Trustee under an agreement with William H. Donner dated August 6, 1940 for the benefit of the said Katherine N. R. Denckla, designated Trust #8555.

14. By the terms of an appointment dated July 7, 1950 (Exhibit D hereto), Dora Browning Donner revoked and eliminated the appointment of December 3, 1949, of \$10,000 to Louisville Trust Company as Trustee for the benefit of Benedict H. Hanson.

15. Subsequent to the death of Dora Browning Donner, Wilmington Trust Company, Trustee of said Trust #2152, pursuant to the provisions thereof and in accordance with the terms of Paragraph (b) of the appointment dated December 3, 1949, "to make all the payments *** directed to be made in cash or in kind or partly in cash and partly in kind; to withhold in whole or in part any payments directed to be made until the expiration of six months but not later than twelve months after *** death," on January 7, 1953, paid to the individual appointees and to Bryn Mawr Hospital the amounts appointed to them, aggregating \$17,000, and on April 17, 1953, delivered to Delaware Trust Company, Trustee under Trusts #9022 and #9023, securities and cash in the aggregate amount of \$400,000. Wilmington Trust Company continues to hold the remaining assets in said trust for the account

of the plaintiff as Executrix and Trustee of the will of Dora Browning Donner.

16. On January 22, 1954, Katherine N. R. Denckla and Elwyn L. Middleton, as guardian of the property of Dorothy B. R. Stewart, without having theretofore served any notice or made any demand on the plaintiff or Wilmington Trust Company as Trustee, filed suit against the plaintiff and the other defendants herein in the Circuit Court of the Fifteenth Judicial Circuit in and for Palm Beach County, Florida, being No. 31,980 in Chancery, asking for a declaratory decree determining the validity of the powers of appointment made by the said Dora Browning Donner under the provisions of her Trust dated March 25, 1935.

17. No valid service of process has been made upon either Wilmington Trust Company or Delaware Trust Company as Trustees in said suit, and said Trustees have not appeared therein. No part of the assets held by Wilmington Trust Company, as Trustee of Trust #2152, and transferred to the appointees under the power of appointment dated December 5, 1949, including those now held by Delaware Trust Company, as Trustee of Trusts #9022 and #9023, are now or have ever been in the State of Florida or under the jurisdiction of the Circuit Court of the Fifteenth Judicial Circuit in and for Palm Beach County, Florida.

18. The plaintiff, being a resident of and having been served in the State of Florida, moved the court to dismiss the suit because indispensable parties were absent the jurisdiction and the court could not, therefore, render an effective and binding final decree. The Circuit Court reserved decision on this motion pend-

ing a trial on the merits, and the Supreme Court of Florida denied certiorari.

19. The complaint in the Florida suit charged that the present plaintiff as Executrix of the Estate of Dora Browning Donner "has failed to take any steps" to capture for the estate the property of the trust appointed as hereinbefore recited. In the argument on the motion to dismiss, the complainants in that suit represented to the court that the plaintiff herein is a "wealthy" person, and could be surcharged by the Florida court for her failure to recover the assets from the Wilmington Trust Company in the first instance, and presently from Delaware Trust Company, after which she could recover from said Trustees. The plaintiff desires to have the controversy hereinbefore set forth promptly and finally and conclusively determined as to all parties so that she may effectively perform all of her duties, account as Executrix and enter upon her duties as Trustee.

20. The plaintiff has no adequate remedy at law.

WHEREFORE, the plaintiff prays that:

(1) An appropriate summons be directed to the said defendants, and in the case of non-residents an appropriate Order for Substituted Service be entered requiring the appearance of the said defendants.

(2) This Court determine by declaratory judgment the persons entitled to participate in the assets held in trust by the Wilmington Trust Company under Trust #2152 and the powers of appointment exercised pursuant thereto, at the date of death of Dora Browning Donner, and enter decrees awarding said funds to the persons entitled thereto.

(3) This Court grant such other and further relief as may be appropriate and necessary to effectuate its said judgment.

William H. Foulk

William Duffy, Jr.

Attorneys for Plaintiff

228 Delaware Trust Building
Wilmington, Delaware

EXHIBIT A

I, DORA BROWNING DONNER, of Palm Beach, Florida, do make, publish and declare this as and for my Last Will and Testament, hereby revoking and making void any and all Wills by me at any time heretofore made.

FIRST: I order and direct that all my just debts and funeral expenses be paid as soon after my death as conveniently may be.

SECOND: It is my desire that I be buried in St. David's Cemetery, Radnor, Pennsylvania, next to the grave of my son William H. Donner, Jr.

THIRD: I direct my Executrix to see that an appropriate marker be placed on my grave.

FOURTH: I give and bequeath all of my personal and household effects, including clothing, jewelry, silverware, furniture and automobiles, unto my daughters ELIZABETH DONNER HANSON and DORA DONNER IDE, or the survivor of them, to be divided between them, if both are living, as they may agree.

FIFTH: All the rest, residue and remainder of my estate, real, personal and mixed, whatsoever and wheresoever the same may be at the time of my death, including any and all property, rights and interest over which I may have power of appointment which prior to my death has not been effectively exercised by me in favor of my Executrix, I direct my Executrix to deal with as follows, namely:—

(a) Thereout to pay all estate, inheritance, transfer or other succession taxes or death duties, State and Federal, which by reason of my death

shall become payable upon or with respect to the property appointed by me by exercise of the power of appointment provided in my favour in paragraph 1 of a certain trust agreement entered into between me and Wilmington Trust Company, a Delaware corporation, as trustee on the 25th day of March, 1935;

(b) To divide the balance into two equal parts;

And I give and bequeath one of said parts to Delaware Trust Company, a corporation of the State of Delaware, its successors and assigns, trustee of a certain trust, dated August 6, 1940, numbered 8555, for the benefit of my daughter KATHERINE N. R. DENCKLA ORDWAY, to be held, administered and/or distributed by it subject to all the trusts, uses, terms and conditions set forth in said trust;

I give and bequeath the remaining part unto my Executrix, IN TRUST, NEVERTHELESS, during the lifetime of my daughter DOROTHY B. RODGERS STEWART, to hold, manage, invest and re-invest the balance, to collect the income thereof and, after paying out of such income all charges and expenses properly payable therefrom, to apply the net income therefrom and/or a part of the principal thereof to the support and maintenance, benefit and/or comfort of my said daughter DOROTHY B. RODGERS STEWART, in such amounts, at such times and in such manner as my daughter KATHERINE N. R. DENCKLA ORDWAY and after her death, the person occupying the office of Treasurer of The Donner Corporation, shall direct, and to accumulate and add to the principal the balance of such net income not so applied; and upon the

death of my said daughter DOROTHY B. RODGERS STEWART, or upon my death if she do not survive me, to pay over the remaining principal and undistributed income, if any, unto said Delaware Trust Company, its successors and assigns, trustee of said trust dated August 6, 1940, numbered 8555, for the benefit of my said daughter KATHERINE N. R. DENCKLA ORDWAY, to be held, administered and/or distributed by it subject to all the trusts, uses, terms and conditions set forth in said trust numbered 8555.

SIXTH: I authorize and empower the Executrix of this my Will and the Trustee of the trust herein created, in her discretion:—

(a) To retain any and all stocks, bonds, notes, securities and/or other property constituting my estate immediately after my death, without liability for any decrease in value thereof.

(b) To sell at public or private sale, exchange for like or unlike property, convey, lease for terms longer or shorter than the trust, and otherwise dispose of any or all property, real or personal, held in the estate by her administered, for such price and upon such terms and credits as may be deemed proper.

(c) To hold uninvested any money available for investment in the trust fund or to invest such money in such stocks, bonds, notes, securities and/or other property as may be deemed appropriate for the trust fund, irrespective of the rules of investment applying to trustees under any present or future laws of any jurisdiction and without any duty to diversify investments.

(d) To participate in any plan or proceedings for protecting or enforcing any right, obligation or interest arising from any stock, bond, note or security held in the estate by her administered, or for reorganizing consolidating, merging, or adjusting the finances of any corporation issuing the same, to accept in lieu thereof any new or substituted stocks, bonds, notes, and/or securities, whether of the same or a different kind or class, or with different priorities, rights or privileges, to pay any assessment or any expense incident thereto, and to do any other act or thing that may be deemed necessary or advisable in connection therewith.

(e) To borrow money for such periods of time and upon such terms or conditions as may be deemed advisable for the purpose of paying any taxes chargeable to the estate by her administered, or for the purpose of taking up subscription rights accruing upon any stock or security held therein, or for the protection, preservation or improvement of the estate by her administered, and she may mortgage or pledge such part or the whole of such estate as may be required to secure such loan or loans.

(f) To vote directly or by proxy at any election or stockholders' meeting any shares of stock held hereunder.

(g) To pay any legacy and to make any division or distribution of the estate by her administered in cash or in kind, or partly in cash and partly in kind, and to value and apportion the property to be so divided or distributed, which valuation and apportionment shall be final and

conclusive upon all persons and corporations interested therein.

(h) To retain any and all property constituting the trust funds in bearer form, or in her own name, or in the name of her nominee or nominees, without disclosing any fiduciary capacity; and her liability as Executrix and/or Trustee shall be neither increased nor decreased thereby.

SEVENTH: The Executrix of this my Will and/or the Trustee of the trust herein created shall exercise the powers heretofore granted to her in subdivisions (b) to (f) of Paragraph SIXTH hereof, only upon the written direction of or with the written consent of the adviser hereinafter named; provided, however, if at any time there shall be no adviser or if the adviser shall fail to give any written direction or to communicate in writing to said Executrix and/or Trustee its consent or disapproval as to the exercise of any of the aforesaid powers, for which exercise the direction or consent of such adviser shall be necessary, within ten days after said Executrix and/or Trustee shall have sent to the adviser, by registered mail at its last known address, a written request for such consent, then the Executrix and/or Trustee is hereby authorized and empowered to take such action in the premises as she, in her discretion, shall deem to be for the best interest of the beneficiary or beneficiaries of the trust created hereunder.

EIGHTH: The Donner Corporation, a corporation of the Commonwealth of Pennsylvania, shall be the sole adviser of the trust herein created. My said adviser shall be paid annually by my Trustee a reasonable fee in an amount to be agreed upon by my adviser and Trustee in compensation of its services and expenses as such adviser.

NINTH: I direct that:—

(a) No person or corporation dealing with the Executrix of this Will and/or the Trustee of the trust herein created shall be obliged to see to the application of any money paid or property delivered to such Executrix or Trustee, or to inquire into the necessity or propriety of such Executrix or Trustee exercising any of the powers herein conferred upon her, or to determine the existence of any fact upon which such Executrix' or Trustee's power to perform any act hereunder may be conditioned.

(b) The principal of my estate or of the trust herein created shall be credited with any stock dividends or subscription rights or distribution of principal or discounts received on investments from time to time held as a part hereof, and such principal shall likewise be charged with any premiums on any such investments.

(c) My said Trustee shall not create or accumulate any sinking fund to offset any premiums at which she may make purchases of securities in the trust estate herein created.

LASTLY: I hereby nominate and appoint my daughter, ELIZABETH DONNER HANSON, to be the Executrix of this my Last Will and Testament, and direct that she be not required to give bond with surety before receiving letters testamentary on my estate.

IN WITNESS WHEREOF, I, the said DORA BROWNING DONNER, have hereunto set my hand and seal this third day of December, in the year of our Lord, one thousand nine hundred and forty-nine (1949).

Dora B. Donner

Signed, sealed, published and declared by the above named DORA BROWNING DONNER as and for her Last Will and Testament, in our presence, who, in her presence, at her request, and in the presence of each other, have hereunto set our hands as witnesses, the day and year last aforesaid.

Dorothy Doyle RN

Address:

4527 Frankford Ave. Phila. Pa.

Address:

Lyde MacFarland

1028 E. Elm Street

Conshohocken, Pa.

EXHIBIT B

THIS AGREEMENT, made this 25th day of March, A.D. 1935, between DORA BROWNING DONNER, of Villa Nova, Pennsylvania, party of the first part, hereinafter called "Trutor", and WILMINGTON TRUST COMPANY, a corporation of the State of Delaware, party of the second part, hereinafter called "Trustee", WITNESSETH:

WHEREAS, Trutor desires to establish a trust of certain securities and property described in "Schedule A" annexed hereto and made a part hereof, which securities and property, together with the investments, reinvestments and proceeds thereof, and such other securities and property as may hereafter be received by Trustee hereunder, are hereinafter called the "trust fund":

NOW, THEREFORE, in consideration of the premises, the mutual covenants hereinafter set forth and the sum of One Dollar (\$1.00) by Trustee to Trutor in hand paid, the receipt whereof is hereby acknowledged, Trutor has assigned, transferred and delivered, and by these presents does assign, transfer and deliver the securities and property described in said "Schedule A" unto Trustee and its successors, IN TRUST, NEVERTHELESS, for the following uses, intents and purposes, that is to say:

Trustee shall hold, manage, invest and reinvest the trust fund, collect the income thereof and pay out of such income all taxes, charges and expenses payable thereout including compensation to Trustee as hereinafter provided.

Trustee shall pay over the net income of the trust fund unto Trutor, for and during the term of her

natural life. Upon the death of Trustor Trustee shall assign, transfer, convey and deliver this trust fund, principal and undistributed income thereof, if any, free from this trust, unto such person or persons and in such manner and amounts and upon such trusts, terms and conditions as Trustor shall have appointed by the last instrument in writing which she shall have executed and delivered to Trustee, or failing such instrument, by her Last Will and Testament, or in default of any such appointment then unto the then living issue of Trustor, per stirpes and not per capita.

In the event of the death of the said Trustor, without having exercised the power of appointment hereinbefore upon her conferred, and without leaving surviving her any issue of hers, then upon the death of the said Trustor, Trustee shall assign, transfer, convey and deliver the trust fund, principal and undistributed income thereof unto the next of kin of said Trustor.

2. Subject to the provisions and limitations herein expressly set forth, Trustee shall have, in general, the power to do and perform any and all acts and things in relation to the trust fund in the same manner and to the same extent as an individual might or could do with respect to its own property. No enumeration of specific powers herein made shall be construed as a limitation upon the foregoing general power, nor shall any of the powers herein conferred upon Trustee be exhausted by the use thereof, but each shall be continuing.

Trustee is specifically authorized and empowered in its sole discretion, except as hereinafter otherwise provided in paragraph "4" hereof:

(a) To retain any and all stocks, bonds, notes, securities and/or other property constitut-

ing the original trust fund or added thereto, without liability on the part of Trustee for any decrease in value thereof.

(b) To sell at public or private sale, exchange for like or unlike property, convey, lease for terms longer or shorter than the trust, and otherwise dispose of any or all property, real or personal, held in the trust fund, for such price and upon such terms and credits as Trustee may deem proper.

(c) To invest the proceeds of any such sale or sales, and any other money available for investment, in such stocks, bonds, notes, securities and/or other income-producing property as may be deemed appropriate for this trust fund, irrespective of the rules of investment applying to trustees under any present or future laws of the State of Delaware or elsewhere.

(d) To vote directly or by proxy at any election or stockholders' meeting any shares of stock held hereunder.

(e) To participate in any plan or proceeding for protecting or enforcing any right, obligation or interest arising from any stock, bond, note or security held in the trust fund, or for reorganizing, consolidating, merging or adjusting the finances of any corporation issuing the same, to accept in lieu thereof any new or substituted stocks, bonds, notes and/or securities, to pay any assessment or any expense incident thereto, and to do any other act or thing that Trustee may deem necessary or advisable in connection therewith.

(f) To determine whether expenses and other disbursements shall be charged against principal or income, or partly against principal and partly against income, and such determination shall be conclusive upon all persons and corporations interested therein.

(g) To take and to hold any security or other property constituting a part of the trust fund, in bearer form or in its own name or in the name of its nominee or nominees, without disclosing its fiduciary capacity, and Trustee's liability shall be neither increased nor decreased thereby.

3. Trustor and/or any other person may at any time and from time to time add to the trust fund by devising, bequeathing, assigning, transferring, conveying, delivering or making payable to Trustee cash, securities, provided such securities are fully paid and non-assessable, and/or other property and all such cash, securities and/or property shall be held by Trustee subject to the terms of this trust.

4. Trustee shall exercise the powers hereinbefore granted to it in subdivisions (b), (c) and (e) of Paragraph "2" hereof only upon the written direction of, or with the written consent of the adviser of the trust; provided, however, that if at any time during the continuance of this trust there shall be no adviser of the trust, or if the adviser of the trust shall fail to give any written direction or to communicate in writing to Trustee his or her consent or disapproval as to the exercise of any of the aforesaid powers for which exercise the direction or consent of such adviser shall be necessary, within ten days after Trustee shall have sent to the adviser of the trust, by registered mail, at

his or her last known address, a written request for such consent, then Trustee is hereby authorized and empowered to take such action in the premises as it, in its sole discretion shall deem to be for the best interest of the beneficiary of this trust.

5. The adviser of the trust shall be William H. Donner, husband of Trustor, or such other person or persons as Trustor may nominate in writing delivered to Trustee during her lifetime, and such other person or persons so nominated shall become the adviser or advisers of this trust at such time and upon the happening of such conditions as the said Trustor may specify in writing.

6. No person or corporation dealing with Trustee shall be obliged to see to the application of money paid or property delivered to Trustee, to inquire into the necessity or the propriety of Trustee exercising any of the powers herein conferred upon it, or to determine the existence of any fact upon which Trustee's power to perform any act hereunder may be conditioned.

7. Any stock dividends or subscription rights or distribution of principal which may be received by Trustee on investments from time to time held by it hereunder shall be added to and form a part of the principal of said trust fund and shall be subject to the trust herein created.

8. Trustee shall charge all premiums and credit all discounts on investments against or to principal, as the case may be, but not against or to income; and Trustee shall not be required to create any reserve out of income for depreciation, obsolescence, amortization or other waste of principal.

9. Trustee shall be liable only for acts or omissions done or permitted to be done by it hereunder in bad faith, but shall not be liable for acts or omissions done or permitted to be done in good faith.

10. Trustor reserves the right to amend, alter or revoke this agreement in whole or in part at any time or times by written instrument signed by the principal and delivered to Trustee; provided, however, that the duties, powers, liabilities and compensation of Trustee hereunder shall not be substantially changed without its written consent.

11. The Trustor shall have the right to change from time to time the Trustee hereunder, to any successful Trust Company (of any state) that has been in business not less than ten years and has capital and surplus of not less than three million dollars; and in the event this right to change the Trustee is exercised, the Trustee then in office shall be entitled to ninety days prior notice in writing, unless such notice is waived by it; whereupon the said retiring Trustee shall transfer, assign and deliver all the moneys, securities and properties then subject hereto to such Trustee as shall be then designated, which successor Trustee shall hold the said trust subject to all the conditions herein, to the same effect as though now named herein, and the retiring Trustee, having fully accounted, shall be relieved after such delivery, transfer and assignment from all and every liability on account of all matters pertaining to the execution of the trust.

12. It is hereby agreed that Trustee shall receive as compensation for its services percentum of the gross income received by it from said trust fund and upon distribution of a part or all of said trust fund Trustee shall receive a sum equivalent to one per-

centum of the principal so distributed. Trustee shall also be entitled to receive a reasonable compensation for any extraordinary services performed by it hereunder.

13. Trustee accepts this trust and agrees to perform same in accordance with its terms and conditions.

IN WITNESS WHEREOF, DORA BROWNING DONNER, Trustor, has hereunto set her Hand and Seal, and WILMINGTON TRUST COMPANY, Trustee, has caused this agreement to be signed in its name by one of its Vice-Presidents and its corporate seal to be hereunto affixed by one of its Assistant Secretaries, all done in duplicate on the day and year first above written.

WITNESS:

J. E. Hairsine DORA BROWNING DONNER (SEAL)

WILMINGTON TRUST COMPANY

By: Walter J. Laird
 Vice-President

ATTEST:

D. Lindsay
Assistant Secretary

SCHEDULE A

112 30/50 shares American Gas & Electric Company
25 shares American Steamship Company Capital
30 shares Consolidated Gas Company of New York
Common

10 shares The Horn & Hardart Company Capital

100 shares Lone Star Gas Corporation 6½% Preferred

5 shares Mission Corporation Common

100 shares Standard Oil Company of New Jersey
Capital

478 shares Sun Oil Company 6% Preferred

160 shares United States Steel Corporation Common
\$2,000 City of Camden, New Jersey Harbor Improvement 5½'s due August 1, 1956

\$7,000 Crucible Steel Company of America Debenture
5's due May 1, 1940

\$16,000 Donner Steel Co. Inc. First Refunding 7's "A"
due January 1, 1942

\$15,000 Goodall Realty Corporation First 6's

\$ 1,000 due October 1, 1940

2,000 due April 1, 1941

10,000 due October 1, 1941

2,000 due April 1, 1942

\$3,000 Lexington Water Power Company First 5's
due January 1, 1968

\$15,000 Lloyds Finance Corporation Guaranteed 6's.,
Series "A" due October 1, 1936

\$20,000 City of Montgomery, Alabama Public Improvement Refunding 5½'s

\$18,000 due July 1, 1958

2,000 due July 1, 1953

- \$15,000 New York Water Service Corporation First
5's "A" due November 1, 1951
- \$100,000 City of Seattle, Washington Municipal Light
and Power Bond 1927 Series LU-1
 - \$ 5,000 due October 1, 1938
 - 3,000 due October 1, 1940
 - 10,000 due October 1, 1943
 - 12,000 due October 1, 1944
 - 10,000 due October 1, 1945
 - 10,000 due October 1, 1949
 - 20,000 due October 1, 1953
 - 25,000 due October 1, 1958
 - 5,000 due October 1, 1959
- \$25,000 United States Rubber Company 6½'s Series
"O" due March 1, 1940
- \$15,000 West Virginia Water Service Company First
5's "A" due August 1, 1951

EXHIBIT C

WHEREAS I, the undersigned, DORA BROWNING DONNER, as Trustor, entered into a certain trust agreement with WILMINGTON TRUST COMPANY, a Delaware corporation, as Trustee, on the 25th day of March, 1935 (hereinafter called the "trust agreement"); and

WHEREAS Paragraph 1 of the trust agreement provided among other things as follows:

"Upon the death of Trustor Trustee shall assign, transfer, convey and deliver this trust fund, principal and undistributed income thereof, if any, free from this trust, unto such person or persons and in such manner and amounts and upon such trusts, terms and conditions as Trustor shall have appointed by the last instrument in writing which she shall have executed and delivered to Trustee,——";

and

WHEREAS by instrument in writing dated the 6th day of April, 1935, I exercised the power of appointment provided as aforesaid by the trust agreement but in said instrument I reserved the right to revoke, alter, amend or modify said exercise of said power of appointment in whole or in part; and

WHEREAS by instrument in writing dated the 11th day of October, 1939, I altered, amended and modified said exercise of said power of appointment; and

WHEREAS I now desire to revoke all exercises by me, previous to the date hereof, of said power of appointment:

THESE PRESENTS WITNESS THAT:

1. I do hereby revoke all exercises by me, previous to the date hereof, of the power of appointment provided as aforesaid by the trust agreement, including, but not so as to restrict the generality of the foregoing, the exercise effected by the said instrument in writing dated the 6th day of April, 1935, as altered, amended and modified by the said instrument in writing dated the 11th day of October, 1939.

2. Exercising the said power of appointment provided as aforesaid by the trust agreement, I do hereby direct Wilmington Trust Company, trustee under the trust agreement, upon my death to assign, transfer, convey and deliver the principal and undistributed income of the trust fund held by it under the trust agreement as follows, namely:—

(a) As soon as conveniently may be, to pay over

(i) The sum of Two thousand dollars to MIRIAM V. MOYER, of Philadelphia, Pennsylvania;

(ii) The sum of One thousand dollars to JAMES SMITH if he shall be in the employment of a member of my family at the time of my death;

(iii) The sum of One thousand dollars to WALTER HAMILTON;

(iv) The sum of One thousand dollars to each of my servants, other than the said Walter Hamilton, who shall have been in my employment for more than two years at the time of my death;

(v) The sum of Ten thousand dollars to Louisville Trust Company, a corporation of

the Commonwealth of Kentucky, its successors and assigns, IN TRUST, NEVERTHELESS, to hold, manage, invest and reinvest the same, to collect the income thereof and after paying out of such income all charges and expenses properly payable therefrom, including a reasonable compensation to my said Trustee, to pay the net income of this trust fund to my son-in-law Benedict H. Hanson during the remainder of his lifetime and upon the death of my said son-in-law, I direct my said Trustee to pay the principal and undistributed income, if any, of the trust unto the Delaware Trust Company, a Corporation of the State of Delaware, its successors and assigns, Trustees of a certain trust dated November 26th, 1948, numbered 9023, created by my daughter Elizabeth Donner Hanson, for the benefit of my grandson, Donner Hanson, to be held administered and/or distributed by it subject to all the trusts, uses, terms and conditions set forth in said trust.

(vi) To the BRYN MAWR HOSPITAL, of Bryn Mawr, Pennsylvania, the sum of Ten thousand dollars to be used by said hospital to endow a bed to be inscribed "In honor of Dorothy B. Rodgers Stewart, given by her mother Mrs. Dora Browning Donner";

(vii) The sum of Two hundred thousand dollars to Delaware Trust Company, a corporation of the State of Delaware, its successors and assigns, trustee of a certain trust dated November 26, 1948, numbered 9022, created by my daughter Elizabeth Donner

Hanson for the benefit of my grandson JOSEPH DONNER WINSOR, to be held, administered and/or distributed by it subject to all the trusts, uses, terms and conditions set forth in said trust numbered 9022; and the further sum of Two hundred thousand dollars to Delaware Trust Company, a corporation of the State of Delaware, its successors and assigns, trustee of a certain trust dated November 26, 1948, numbered 9023, created by my daughter Elizabeth Donner Hanson for the benefit of my grandson DONNER HANSON, to be held, administered and/or distributed by it subject to all the trusts, uses, terms and conditions set forth in said trust numbered 9023;

(b) As soon as conveniently may be, to pay the residue of the principal and undistributed income of the said trust fund held by it under the trust agreement to the Executrix of my Last Will and Testament to be dealt with by her in accordance with the terms and conditions of my said Last Will and Testament and any Codicil thereto.

I authorize and direct said Wilmington Trust Company to make all the payments hereinbefore directed to be made in cash or in kind or partly in cash and partly in kind; to withhold in whole or in part any payments directed to be made until the expiration of six months but not later than twelve months after my death; and to make the payments hereinbefore directed to be made in the order in which they are set forth until all of the property held by it shall have been completely distributed, none of said payments to be made unless and until all of the payments preceding it in the order in which in this instrument they are set forth shall have been made in full.

IN WITNESS WHEREOF I, the said Dora Browning Donner, have set hereto my hand and seal this 3rd day of December, A.D. 1949.

Witness:

Dorothy A. Doyle RN . . DORA B. DONNER

Delivery of the foregoing instrument in writing dated the 3rd day of December, A.D. 1949, executed by Dora Browning Donner, has been made to Wilmington Trust Company this 21st day of December A.D. 1949.

WILMINGTON TRUST COMPANY

By: Jos. W. Chinn, Jr.
Vice President & Trust Officer

Attested: J. Y. Jeanes, Jr.
Assistant Secretary

EXHIBIT D

WHEREAS I, the undersigned DORA BROWNING DONNER, as Trustor, entered into a certain trust agreement with WILMINGTON TRUST COMPANY, a Delaware corporation, as Trustee, on the 25th day of March, 1935 (hereinafter called the "trust agreement"); and

WHEREAS Paragraph 1 of the trust agreement provided among other things as follows:

"Upon the death of Trustor Trustee shall assign, transfer, convey and deliver this trust fund, principal and undistributed income thereof, if any, free from this trust, unto such person or persons and in such manner and amounts and upon such trusts, terms and conditions as Trustor shall have appointed by the last instrument in writing which she shall have executed and delivered to Trustee, —";

and

WHEREAS by instrument in writing dated the 3rd day of December 1949, I exercised the power of appointment provided as aforesaid by the trust agreement after revoking all exercises by me, previous to the date thereof, of said power of appointment; and

WHEREAS I now desire to partially revoke the said instrument in writing dated the 3rd day of Decem-

ber 1949 by which I exercised said power of appointment.

THESE PRESENTS WITNESS THAT:

1. I do hereby partially revoke said instrument in writing the 3rd day of December 1949 by the deletion therefrom of subsection (V) of section (a) of Article 2 which reads as follows:-

(V) The sum of Ten thousand dollars to Louisville Trust Company, a corporation of the Commonwealth of Kentucky, its successors and assigns, IN TRUST, NEVERTHELESS, to hold, manage, invest and reinvest the same, to collect the income thereof and after paying out of such income all charges and expenses properly payable therefrom, including a reasonable compensation to my said Trustee, to pay the net income of this trust fund to my son-in-law Benedict H. Hanson during the remainder of his lifetime and upon the death of my said son-in-law, I direct my said Trustee to pay the principal and undistributed income, if any, of the trust unto the Delaware Trust Company, a corporation of the State of Delaware, its successors and assigns, Trustee of a certain trust dated November 26th, 1948, numbered 9023, created by my daughter Elizabeth Donner Hanson, for the benefit of my grandson, Donner Hanson, to be held administered and/or distributed by it subject to all the trusts, uses, terms and conditions set forth in said trust.

2. In all other respects, I do hereby confirm the instrument in writing dated the 3rd day of December 1949 by which I exercised the said power of appointment provided as aforesaid by the trust agreement.

IN WITNESS WHEREOF I, the said Dora Browning Donner, have set hereto my hand and seal this 7th day of July, A.D. 1950.

Witness:

Grace E. Walker

DORA B. DONNER

Delivery of the foregoing instrument in writing dated the 7th day of July, A.D. 1950, executed by Dora Browning Donner, has been made to Wilmington Trust Company this 11th day of July A.D. 1950.

WILMINGTON TRUST COMPANY

By: Joseph Rhoads
Asst. Vice-Pres.

Attested: T. Wm. Hitchcock
Asst. Sec.

EXHIBIT E

WHEREAS, I, the undersigned, DORA BROWNING DONNER, of Villa Nova, Pennsylvania, as Trustor, entered into a certain trust agreement with WILMINGTON TRUST COMPANY, a Delaware corporation, as Trustee on the 25th day of March, 1935; and

WHEREAS, paragraph 1 of said trust agreement provided among other things as follows:

“Upon the death of Trustor Trustee shall assign transfer, convey and deliver this trust fund, principal and undistributed income thereof, if any, free from this trust, unto such person or persons and in such manner and amounts and upon such trusts, terms and conditions as Trustor shall have appointed by the last instrument in writing which she shall have executed and delivered to Trustee, —”

and

WHEREAS, I hereby desire to exercise the foregoing power of appointment which I reserved in said trust agreement:

NOW, THEREFORE, I, the undersigned, Dora Browning Donner, in consideration of the premises and the mutual covenants in said trust agreement dated March 25, 1935 set forth, do hereby exercise the power of appointment which I reserved in paragraph “1” of said trust agreement dated March 25, 1935, and in the exercise of same I do hereby direct Wilmington Trust Company, Trustee under said trust agreement dated March 25, 1935, upon my death, to hold, administer and/or distribute the principal and net income of the trust fund from and after my death as follows:

A:— To pay over unto the Executor or Executors of my estate such amount or amounts as such Executor or Executors may request in writing delivered to the Trustee of said trust dated March 25, 1935 prior to the expiration of six months after my death;

B:— As soon as conveniently may be, to pay over the sum of Five Thousand Dollars (\$5,000) unto the Bryn Mawr Hospital of Bryn Mawr, Pennsylvania, to be used by said hospital to endow a bed for the benefit of young boys, said bed to be inscribed "In memory of William H. Donner, Jr., given by his mother, Mrs. Dora Browning Donner";

C:— As soon as conveniently may be to pay over the sum of Ten Thousand Dollars (\$10,000.00) unto John Stewart, presently residing in Radnor, Pennsylvania, his heirs, executors, administrators or assigns;

D:— As soon as conveniently may be to pay over the sum of Ten Thousand Dollars (\$10,000.00) unto Louisville Trust Company of Louisville, Kentucky, Trustee under agreement with William H. Donner dated September 28, 1934, for the benefit of Dora Browning Stewart, if said trust shall not have terminated prior to the date when such payment may be made, but if said trust shall have terminated prior to the date when such payment may be made then unto Dora Browning Stewart, if living, but if said Dora Browning Stewart shall not then be living then unto her then living issue, per stirpes and not per capita, or in default of any such issue then unto such person or persons as shall then be determined to be the distributees of Dora Browning Stewart under the intestacy laws of the State of Delaware in effect at the time of her death.

E:— As soon as conveniently may be to pay over the sum of Ten Thousand Dollars (\$10,000.00) unto

Louisville Trust Company of Louisville, Kentucky, Trustee under agreement with William H. Donner dated September 28, 1934, for the benefit of Mary Washington Stewart, if said trust shall not have terminated prior to the date when such payment may be made, but if said trust shall have terminated prior to the date when such payment may be made, then unto Mary Washington Stewart, if living, but if said Mary Washington Stewart shall not then be living then unto her then living issue, per stirpes and not per capita, or in default of any such issue then unto such person or persons as shall then be determined to be the distributees of Mary Washington Stewart under intestacy laws of the State of Delaware in effect at the time of her death.

F:— As soon as conveniently may be to pay over the sum of Ten Thousand Dollars (\$10,000.00) unto Louisville Trust Company of Louisville, Kentucky, Trustee under agreement with William H. Donner dated September 28, 1934, for the benefit of Paula Browning Denckla, if said trust shall not have terminated prior to the date when such payment may be made, but if said trust shall have terminated prior to the date when such payment may be made then unto Paula Browning Denckla, if living, but if said Paula Browning Denckla shall not then be living, then unto her then living issue, per stirpes and not per capita, or in default of any such issue then unto such person or persons as shall then be determined to be the distributees of Paula Browning Denckla under the intestacy laws of the State of Delaware in effect at the time of her death.

G:— As soon as conveniently may be to pay over the sum of Ten Thousand Dollars (\$10,000.00) unto Louisville Trust Company of Louisville, Kentucky, Trustee under agreement with William H. Donner dated December 22, 1934, for the benefit of William

Donner Denckla, if said trust shall not have terminated prior to the date when such payment may be made, but if said trust shall have terminated prior to the date when such payment may be made then unto William Donner Denckla, if living, but if said William Donner Denckla shall not then be living, then unto his then living issue, per stirpes and not per capita, or in default of any such issue then unto such person or persons as shall then be determined to be the distributees of William Donner Denckla under the intestacy laws of the State of Delaware in effect at the time of his death.

H:— As soon as conveniently may be to pay over the sum of Ten Thousand Dollars (\$10,000.00) unto Louisville Trust Company of Louisville, Kentucky, Trustee under agreement with William H. Donner dated December 22, 1934, for the benefit of William Donner Roosevelt, if said trust shall not have terminated prior to the date when such payment may be made, but if said trust shall have terminated prior to the date when such payment may be made then unto William Donner Roosevelt, if living, but if said William Donner Roosevelt shall not then be living, then unto his then living issue, per stirpes and not per capita, or in default of any such issue then unto such person or persons as shall then be determined to be the distributees of William Donner Roosevelt under the intestacy laws of the State of Delaware in effect at the time of his death.

I:— As soon as conveniently may be, to set aside and hold in further trust hereunder the sum of Ten Thousand Dollars (\$10,000.00) for each grandchild of Trustor that may be born after the date of this instrument but prior to the death of Trustor, as a separate trust fund, each of such separate trust funds, if any, to be held administered and/or distributed as follows:

To apply the net income of the trust fund to the support, maintenance, benefit and/or education of such grandchild for whom such trust fund shall have been set aside in such manner and to such extent as Trustee, in its sole discretion, shall deem to be for the best interest of such grandchild until such grandchild shall have attained the age of twenty-one years, at which time, or if such grandchild shall have attained the age of twenty-one years at the time when such fund shall be for him or her set aside then upon the setting aside of such trust fund Trustee shall assign, transfer convey and deliver such trust fund, principal and undistributed income thereof, in any, free from this trust, unto such grandchild. Any application of such income as afore-said may be made directly by Trustee, or by payment to the guardian of the person of such grandchild, or to the person with whom such grandchild shall reside, or directly to such grandchild, and any such application or payment shall be a full discharge to Trustee therefor.

In the event of the death of any grandchild of Trustor for whom a separate trust fund shall be set aside as hereinbefore provided prior to such grandchild receiving distribution thereof, then upon the death of such grandchild Trustee shall assign, transfer, convey and deliver such separate trust fund set aside for such grandchild of Trustor so dying unto such person or persons as shall then be determined to be the distributees of such grandchild of Trustor so dying under the intestacy laws of the State of Delaware in effect at the time of the death of such grandchild.

J:— As soon as conveniently may be to pay over the balance of the trust fund, if any, after making all of the foregoing payments, as follows:

One-half thereof unto Wilmington Trust Company, Trustee under agreement with William H. Don-

ner dated March 18, 1932 for the benefit of Katherine N. R. Denckla, if such trust shall not have terminated prior to the date when such payment may be made, but if such trust shall have terminated prior to the date when such payment may be made then unto Katherine N. R. Denckla, if living, but if said Katherine N. R. Denckla shall not then be living, then unto her then living issue, per stirpes and not per capita, or in default of any such issue then unto Dorothy Browning Stewart, if living, but if said Dorothy Browning Stewart shall not then be living, then unto her then living issue per stirpes and not per capita, or in default of any such issue, then unto such person or persons as shall then be determined to be the distributees of Dorothy Browning Stewart under the intestacy laws of the State of Delaware in effect at the time of her death;

The remaining one-half thereof unto Wilmington Trust Company, Trustee under agreement with William H. Donner dated March 20, 1932 for the benefit of Dorothy Browning Stewart, if such trust shall not have terminated prior to the date when such payment may be made, but if such trust shall have terminated prior to the date when such payment may be made, then unto Dorothy Browning Stewart, if living, but if said Dorothy Browning Stewart shall not then be living, then unto her then living issue, per stirpes and not per capita, or in default of any such issue then unto such person or persons as shall then be determined to be the distributees of Dorothy Browning Stewart under the intestacy laws of the State of Delaware in effect at the time of her death.

I authorize and direct said Trustee to make any of the payments hereinbefore directed to be made in cash or in kind or partly in cash and partly in kind; to withhold in whole or in part any payments directed to be made in paragraphs B to J inclusive until the ex-

piration of six months but not later than twelve months after my death; and to make the payments hereinbefore directed to be made in the order in which they are set forth until all of the property held by it shall have been completely distributed,—none of said payments to be made unless and until all of the payments preceding it in the order in which they are set forth shall have been made in full.

I hereby reserve the right to revoke, alter amend or modify in whole or in part the appointment herein made of the property held by Wilmington Trust Company as Trustee under that certain agreement which I entered into with it on March 25, 1935.

IN WITNESS WHEREOF, I, the said DORA BROWNING DONNER, have hereunto set my Hand and Seal this sixth day of April, A.D. 1935.

WITNESS:

J. E. Hairsine DORA BROWNING DONNER (SEAL)

WILMINGTON TRUST COMPANY hereby acknowledges receipt of the foregoing exercise of power of appointment by Dora Browning Donner this 17th day of May A.D. 1935.

WILMINGTON TRUST COMPANY

By: Tilghman Johnson, V. P.

Attest: A. W. Birch, Ass't. Sec'y.

EXHIBIT F

WHEREAS, I, the undersigned, DORA BROWNING-DONNER, as Trustor, entered into a certain trust agreement with WILMINGTON TRUST COMPANY, a Delaware Corporation, as Trustee, on the 25th day of March, 1935; and

WHEREAS, Paragraph 1 of said trust agreement provided among other things as follows:

“Upon the death of Trustor Trustee shall assign, transfer, convey and deliver this trust fund, principal and undistributed income thereof, if any free from this trust, unto such person or persons and in such manner and amounts and upon such trusts, terms and conditions as Trustor shall have appointed by the last instrument in writing which she shall have executed and delivered to Trustee, —”

and

WHEREAS, by instrument in writing dated the 6th day of April 1935, I exercised the foregoing power of appointment and in said instrument of writing I reserved the right to revoke, alter, amend or modify said exercise of said power of appointment in whole or in part; and

WHEREAS, I now desire to alter, amend and modify said exercise of said power of appointment dated the 6th day of April, 1935, and do hereby alter, amend and modify the same as follows:—

1:— By revoking and canceling Paragraph 3 appearing on page 2 thereof and reading as follows:—

“C:— As soon as conveniently may be to pay over the sum of Ten Thousand Dollars (\$10,000.00)

unto John Stewart, presently residing in Radnor, Pennsylvania, his heirs, executors, administrators or assigns;”

and substituting in lieu thereof the following:—

“C:— As soon as conveniently may be to pay over the sum of Fifteen Thousand Dollars (\$15,000.00) unto John Stewart, presently residing in Radnor, Pennsylvania, his heirs, executors, administrators or assigns, & the sum of One Thousand Dollars (\$1,000.00) unto James Smith, presently residing in Villanova, Pennsylvania,—his heirs, executors, administrators or assigns;”

I hereby ratify and confirm said exercise of said power of appointment dated the 6th day of April, 1935 in all other respects.

IN WITNESS WHEREOF, I, the said DORA BROWNING DONNER, have hereunto set my Hand and Seal this 11th day of October A.D. 1939.

WITNESS:

J. E. Hairsine DORA BROWNING DONNER (SEAL)

WILMINGTON TRUST COMPANY hereby acknowledges receipt of the foregoing alteration, amendment and modification of exercise of power of appointment dated April 6, 1935 by Dora Browning Donner this 11th day of October A.D. 1939.

WILMINGTON TRUST COMPANY

By: Walter J. Laird, V. P.

Attest: A. W. Birch, Ass't Secy.

**ANSWER OF WILMINGTON TRUST COMPANY,
TRUSTEE.**

(Filed August 13, 1954.)

The answer of Wilmington Trust Company, Trustee, respectfully shows:

(1) The averments of paragraphs 1, 2, 7, 9, 10, 11, 12, 14 and 17 of the complaint are admitted.

(2) This defendant has no knowledge concerning, and neither admits nor denies, the averments contained in paragraphs 3, 4, 5, 6, 13, 18 and 19 of the complaint.

(3) This defendant admits the averments of paragraph 8 of the complaint, except that it has no knowledge with respect to the reason for the joinder of the parties mentioned in said paragraph.

(4) Defendant admits the averments of paragraph 15 of the complaint, except that it denies that it holds the remaining assets of the trust for the account of the plaintiff which is therein averred, but further shows that this defendant has paid unto the said plaintiff on account of Federal and Florida estate taxes the sum of Four Hundred Fifty-five Thousand Seven Hundred Seventy-seven Dollars and Eighty-one Cents (\$455,777.81).

(5) Defendant admits the averments of paragraph 16 of the complaint in so far as the said

paragraph concerns this defendant, and has no knowledge or information concerning the other averments of said paragraph.

(sgd) C. S. LAYTON

Richards, Layton & Finger

Attorneys for Defendant,

Wilmington Trust Company,

Trustee

4072 duPont Building

Wilmington, Delaware

ANSWER DELAWARE TRUST COMPANY.

(Filed August 26, 1954.)

(1) This defendant admits the allegations of paragraphs 2, 3, 6 and such parts of paragraphs 12, 15, and 17 as pertain to this defendant.

(2) This defendant has no information to form a belief as to the remaining allegations of the complaint and consequently neither admits nor denies the same.

(3) For further answer to said complaint this defendant avers that the payments made to this defendant as alleged in paragraph 15 of the complaint were legally and properly made.

/s/ David F. Anderson
Attorney for Delaware Trust
Company, Trustee, one of the
Defendants
948 Delaware Trust Building
Wilmington, Delaware

**ANSWER OF EDWIN D. STEEL, JR., GUARDIAN
AD LITEM FOR JOSEPH DONNER WINSOR
AND DONNER HANSON.**

(Filed September 2, 1954.)

1. Defendants admit, upon information and belief, the allegations of paragraphs 1, 2, 3, 8, 9, 10, 11, 12, 13, 14, and 17 of the complaint.

2. Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraphs 4 and 18 of the complaint.

3. Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations of the first sentence of paragraph 5 of the complaint. Defendants, upon information and belief, admit that the allegations of the last sentence of paragraph 5 of the complaint are substantially accurate, but defendants beg leave to refer to the will of Dora Browning Donner for an accurate and complete statement of the terms of said will.

4. Defendants admit the allegations of paragraph 6 of the complaint.

5. Defendants admit, upon information and belief, the allegations of paragraph 7 of the complaint, except that defendants are without knowledge or information sufficient to form a belief as to the truth of the allegation that the individual defendants therein referred to are non-residents of the State of Delaware.

6. Defendants admit, upon information and belief, the allegations contained in the first sentence of paragraph 15 of the complaint. Defendants, upon information and belief, deny the allegations of the last sentence of paragraph 15 of the complaint.

7. Defendants admit, upon information and belief, that the allegations of paragraph 16 of the complaint are substantially accurate, except that defendant denies, upon information and belief, that the parties defendant in the Florida litigation referred to in paragraph 16 of the complaint are identical with the parties defendant in the instant action.

8. Defendants admit, upon information and belief, that the allegations of the first sentence of paragraph 19 of the complaint are substantially accurate, but defendants are without knowledge or information sufficient to form a belief as to the truth of the remaining allegations of paragraph 19 of the complaint.

9. Defendants alledge that the allegations of paragraph 20 of the complaint constitute legal conclusions which defendants are not required to answer.

WHEREFORE, the defendant, Edwin D. Steel, Jr., guardian ad litem for Joseph Donner Winsor and Donner Hanson, prays that the court adjudge and determine that:

(a) The execution and delivery by Dora Browning Donner (sometimes referred to as Dora B. Donner) to the Wilmington Trust Company of the document dated December 3, 1949, (Complaint Exhibit C), and the execution and delivery by Dora Browning Donner to the Wilmington Trust Company of the document dated July 7, 1950, (Complaint Exhibit D), constituted valid and effective exercises of the power of appointment reserved to Dora Browning Donner under the agreement dated March 25, 1935, between Dora Browning Donner and Wilmington Trust Company (Complaint Exhibit B), insofar as Wilmington Trust Company, Trustee under the aforesaid agreement dated March 25, 1935 was directed by paragraph 2 (a) (vii) of the instrument dated December 3, 1949 (confirmed

by paragraph 2 of the instrument dated July 7, 1950) to assign, transfer, convey and deliver out of the principal and undistributed income of the trust fund held by the Wilmington Trust Company under the agreement with Dora Browning Donner dated March 25, 1935:

(vii) The sum of Two hundred thousand dollars to Delaware Trust Company a corporation of the State of Delaware, its successors and assigns, trustee of a certain trust dated November 26, 1948, numbered 9022, created by my daughter Elizabeth Donner Hanson for the benefit of my grandson JOSEPH DONNER WINSOR, to be held, administered and/or distributed by it subject to all the trusts, uses, terms and conditions set forth in said trust numbered 9022; and the further sum of Two hundred thousand dollars to Delaware Trust Company, a corporation of the State of Delaware, its successors and assigns, trustee of a certain trust dated November 26, 1948, numbered 9023, created by my daughter Elizabeth Donner Hanson for the benefit of my grandson DONNER HANSON, to be held, administered and/or distributed by it subject to all the trusts, uses, terms and conditions set forth in said trust numbered 9023.

(b) The payments referred to in paragraph 15 of complaint made by Wilmington Trust Company, Trustee under the agreement dated March 25, 1935 between Dora Browning Donner and Wilmington Trust Company, to Delaware Trust Company, Trustee under Trusts No. 9022 and 9023, in accordance with paragraph 2(a) of the instrument dated December 3, 1949 (confirmed by paragraph 2 of the instrument dated July 7, 1950) were valid and proper payments.

(c) All parties to this litigation are forever barred and foreclosed from contesting the adjudications prayed for in paragraphs (a) and (b) hereof.

EDWIN D. STEEL, JR.

Guardian ad litem for

Joseph Donner Winsor and

Donner Hanson

3018 duPont Building

Wilmington, Delaware

**ANSWER OF ROBERT B. WALLS, JR. GUARDIAN
AD LITEM FOR DOROTHY B. R. STEWART,
A MENTALLY ILL PERSON, AND FOR WIL-
LIAM DONNER DENCKLA AND CURTIN WIN-
SOR, JR., INFANTS.**

(Filed 2 14 55.)

1. Admitted

2. Admitted

3. Admitted

4. Defendants are without knowledge or information sufficient to form a belief as to the truth of the averment.

5. (a) As to the first sentence, defendants are without knowledge or information sufficient to form a belief as to the truth of the averment;

(b) As to the second sentence, admitted.

6. Defendants are without knowledge or information sufficient to form a belief as to the truth of the averment.

7. Defendants are without knowledge or information sufficient to form a belief as to the truth of the averment.

8. Admitted that the dates of the purported exercises of alleged power of appointment and contents of purported exercises are correctly set forth; as to the validity of the purported exercises, these defendants make answer in paragraphs 21 and 22 hereof.

9. Admitted, except as to the allegation that the trustee has continued to administer the trust in ac-

cordance with the terms thereof since the date of its creation, as to which these defendants are without knowledge or information sufficient to form a belief as to the truth thereof.

10. Admitted that the date of the purported exercise of alleged power of appointment and contents of the purported exercise are correctly set forth; as to the validity of the purported exercise, these defendants make answer in paragraph 21 hereof.

11. Admitted that the date of the purported exercise of alleged power of appointment and contents of the purported exercise are correctly set forth; as to the validity of the purported exercise, these defendants make answer in paragraph 21 hereof.

12. Admitted that the date of the purported exercise of alleged power of appointment and contents of the purported exercise are correctly set forth; as to the validity of the purported exercise, these defendants make answer in paragraph 22 hereof.

13. Admitted

14. Admitted that the terms of the purported exercise of the alleged power of appointment are correctly set forth; as to the validity thereof these defendants make answer in paragraph 22 hereof.

15. Defendants are without knowledge or information sufficient to form a belief as to the truth of the averment.

16. Defendants are without knowledge or information sufficient to form a belief as to the truth of the averment.

17. Defendants are without knowledge or information sufficient to form a belief as to the truth of the averment.

18. Defendants are without knowledge or information sufficient to form a belief as to the truth of the averment.

19. Defendants are without knowledge or information sufficient to form a belief as to the truth of the averment.

20. Admitted

NEW MATTER

21. As to the validity of the purported exercises of the alleged power of appointment, of April 6, 1935, and October 11, 1939, defendants allege:

(a) They are valid as deeds and not as instruments testamentary in character.

(b) In the alternative, if they are instruments testamentary in character, they are valid because they were executed in accordance with the law of Pennsylvania, the domicile of Dora Browning Donner, at the time of the exercises.

(c) In the alternative, if they are invalid as instruments testamentary in character and invalid as deeds, they are so invalid as deeds because the alleged trust of March 25, 1935 was a mere agency account in that the alleged trustor, Dora Browning Donner, reserved to herself for life, possession, income and principal, and retained all or substantially all powers of management and control.

22. As to the validity of the purported exercises of the alleged power of appointment of December 3, 1949 and July 7, 1950, defendants allege:

(a) They are valid as deeds and not as instruments testamentary in character,

(b) In the alternative if invalid as deeds, they are so invalid for the reasons set forth in paragraph 21 c hereof.

/s/ R. B. Walls, Jr.

Robert B. Walls, Jr.

Guardian ad litem for

Dorothy B. R. Stewart,

William Donner Denckla

and Curtin Winsor, Jr.

500 Industrial Trust Bldg.

Wilmington, Delaware

MOTION FOR SUMMARY JUDGMENT.

(Filed November 18, 1954.)

NOW COMES EDWIN D. STEEL, who by order dated September 1, 1954, has been appointed guardian ad litem for Joseph Winsor and Donner Hanson, minors, two of the defendants in the above action, and moves the Court to enter a summary judgment in conformity with paragraphs (a), (b) and (c) of the prayers of the answer filed herein by Edwin D. Steel, guardian ad litem for Joseph Donner Winsor and Donner Hanson, on the ground that there is no genuine issue as to any material fact and that a judgment as prayed for in said answer is warranted as a matter of law.

This motion is based upon:

- (a) Affidavit of Paul D. Lovett
- (b) Affidavit of George Ainslie Goad
- (c) Affidavit of Joseph W. Chinn, Jr.
- (d) Affidavit of C. Kenneth Baxter
- (e) Affidavit of Edwin D. Steel, Jr.

(f) Certified copy of the following papers which have been filed in the action of *Denckla et al. v. Wilmington Trust Company, et al.*—No. 31980—in the Circuit Court of the Fifteenth Judicial Circuit in and for Palm Beach County, Florida (in Chancery):

Motion of Elizabeth Donner Hanson to Dismiss Suit—Filed February 18th, 1954;

Order Postponing Ruling on Motion of Elizabeth Donner Hanson—Entered and Filed April 9th, 1954;

Answer of Elizabeth Donner Hanson Exclusive of Delaware Complaint and Exhibits attached thereto—Filed August 3rd, 1954.

(g) Certified copy of the following papers filed in the Supreme Court of Florida in the action entitled *Elizabeth Donner Hanson etc., et al., Petitioner v. Katherine M. R. Denckla, et al., Respondents*—June term A.D. 1954:

Order dated June 29, 1954 denying petition for certiorari

Order dated July 16, 1954 denying petition for rehearing.

Dated: November 18, 1954.

/s/ EDWIN D. STEEL, JR.

Guardian ad litem for Joseph

Donner Hanson and Donner Winsor

3018 duPont Building

Wilmington, Delaware

**ANSWER OF DEFENDANTS DORA STEWART
LEWIS, MARY WASHINGTON STEWART
BORIE, AND PAULA BROWNING DENCKLA.**

Counter Claim and Cross-Claim.

(Filed 7/22/55.)

1. Admitted.

2. Admit the first sentence of paragraph 2, but these defendants are without information as to the alleged trusts referred to therein established by William H. Donner on March 18, 1932, and March 19, 1932, and neither admit nor deny the averments made concerning the same. Deny that Wilmington Trust Company is trustee under an agreement with Dora Browning Donner dated March 25, 1935.

3. Admitted.

4. Admitted.

5. Admitted.

6. Admitted.

7. Deny the averments of this paragraph, and say that each defendant set forth in said paragraph has wrongfully received the sum set opposite his name.

8. Admit that the purported powers of appointment mentioned in this paragraph were exercised as therein set out, but say that the purported appointments were not valid acts and created no rights in said defendants.

9. Admit that Dora Browning Donner entered into an agreement with Wilmington Trust Company dated March 25, 1935, (Exhibit B to the complaint herein) and that the securities listed in Schedule A

of said agreement were delivered to Wilmington Trust Company, but deny said agreement established a valid trust.

10. Admit that the purported powers of appointment mentioned in this paragraph were exercised as set out therein, but say that the purported appoint-said defendants.

11. Admit that the purported powers of appointment mentioned in this paragraph were exercised as set out therein, but say that the purported appointments were not valid acts and created no rights in said defendants.

12. Admit that the purported powers of appointment mentioned in this paragraph were exercised as set out therein, but say that the purported appoint-said defendants.

13. Admitted.

14. Admit that the purported power of appointment was allegedly exercised as set out therein.

15. Admitted, except they aver that such payments were made prior to the expiration of six months from the date of the death of Dora Browning Donner and that the payments to Delaware Trust Company were made on March 30, 1953, and these defendants further aver that such payments were illegally and invalidly made and were made contrary to the Last Will and Testament of Dora Browning Donner.

16. Admitted.

17. Denied, except it is admitted that neither Wilmington Trust Company nor Delaware Trust Company appeared in said action and that the assets were never physically in Florida.

18. Admitted.

19. These defendants have no knowledge concerning the averments of this paragraph, and neither admit nor deny the same, but allege that the charges of the Florida suit are set out in the complaint attached as Exhibit A, to the motion to dismiss filed herein by these answering defendants.

20. These defendants aver that the allegation continued in Paragraph 20 is a legal conclusion which these defendants are not required to answer.

21. Further answering said complaint and for an affirmative defense, these defendants aver that said Florida action mentioned in paragraph 15 of said complaint concerned questions raised herein. On the 14th day of January 1955 the Circuit Court of the Fifteenth Judicial Circuit in and for Palm Beach County, Florida entered a summary final decree in said Chancery Case No. 31,980, which decree provided:

“Concerning the declaration of trust dated March 25, 1935, and particularly the power of appointment dated December 3, 1949, no present interest passed to any beneficiary other than the Trustor (Testatrix). It seems clear to me, from the authorities, that the power of appointment was testamentary in character and did not constitute a valid inter vivos trust appointment. As the appointment had only one subscribing witness, rather than two, as required in Florida, it did not constitute a valid testamentary disposition. Hence, the executrix should receive the assets and dispose of them agreeable to the will under which she was appointed.”

Such decree is res judicata of the issues and questions raised herein, or in the alternative constitutes a collateral estoppel against the parties to this cause

who seek to relitigate the issues determined in the Florida action.

22. Further answering said complaint and for an affirmative defense, these defendants aver that the Circuit Court of the Fifteenth Judicial Circuit of Florida, in and for Palm Beach County, Florida, on August 25, 1954, entered an order enjoining Elizabeth Donner Hanson, a resident of Palm Beach County and an appearing defendant in said Chancery Case No. 31,980, from further prosecuting either individually or through counsel, this action, No. 531, in this Court of Chancery of the State of Delaware; in and for New Castle County, which said order remains in full force and effect.

WHEREFORE, these defendants pray that the relief sought in the complaint herein filed be denied and the costs assessed against the plaintiff.

Counter-Claim.

1. Dora Browning Donner died a citizen and resident of Palm Beach County, Florida, on November 20, 1952, leaving a Last Will and Testament dated December 3, 1949, a copy of which is attached to the complaint herein as Exhibit A. Said Will was duly admitted to probate in the County Judge's Court in and for Palm Beach County, Florida, on December 23, 1952. At the time of her death, and at all times subsequent to January, 1944, decedent, Dora Browning Donner, was and had been a resident of the domiciled in Palm Beach County, Florida, and up to the date of her death, decedent paid intangible taxes assessed in Palm Beach County, Florida, upon all of the intangibles forming a part of the assets deposited with Wilmington Trust Company, Wilmington, Delaware under an agreement described in the next paragraph hereof.

2. On March 25, 1935, said Dora Browning Donner executed an agreement with the Wilmington Trust Company, Wilmington, Delaware, a copy of which is Exhibit B attached to the complaint filed herein. By virtue of the terms thereof and the powers retained by the said Dora Browning Donner and the manner in which the terms thereof were carried out, said agreement constituted an agency agreement terminable at any time by the said Dora Browning Donner or by her death.

3. With respect to the said agreement dated March 25, 1935, at the time it was entered into and until the death of Dora Browning Donner, no present interest passed to any beneficiary other than the said Dora Browning Donner. Said agreement was revocable at all times by the said Dora Browning Donner, and at all times during its existence said Dora Browning Donner retained all powers over the management and investment of the fund held by Wilmington Trust Company under said agreement and had complete control over the securities constituting said fund. Wilmington Trust Company at no time exercised any independent judgment with respect to said fund.

4. On or about December 3, 1949, Dora Browning Donner purported to execute an alleged power of appointment allegedly pursuant to the terms of the agreement of March 25, 1935, which said alleged power of appointment is attached as Exhibit C to the complaint filed herein. Said alleged power of appointment was executed by Dora Browning Donner at a time when she was a citizen of and domiciled in Palm Beach County, Florida. Said alleged exercise of the power of appointment was testamentary in character and was not to take effect until after the death of the said Dora Browning Donner and was not executed in the manner

required by the law of Florida for testamentary dispositions, as appears in paragraph 21 of the answer of these defendants filed herein.

5. By reason of the facts set out in the foregoing paragraphs 1 to 4 inclusive, the purported exercise of power of appointment of December 3, 1949, was invalid and of no effect, and the agreement of March 25, 1935, between Dora Browning Donner and the Wilmington Trust Company terminated on the date of her death, November 20, 1952. Upon qualifying as the executrix under the Last Will and Testament of Dora Browning Donner in December, 1952, it thereupon became the duty of Elizabeth Donner Hanson, as such executrix, to carry out the terms and provisions of the Will of Dora Browning Donner and to administer its assets accordingly, including the assets of said estate on deposit with Wilmington Trust Company. Said Elizabeth Donner Hanson, as such executrix, has neglected and failed so to do and, on the contrary, has permitted the assets of the estate of Dora Browning Donner on deposit at the time of her death at the Wilmington Trust Company to be depleted and wasted by directing the Wilmington Trust Company to pay from the assets of said estate to the parties mentioned and in the amounts set forth as appears in paragraph 15 of the complaint filed herein, and not to those entitled thereto under the Last Will and Testament of Dora Browning Donner.

WHEREFORE, defendants, Dora Stewart Lewis, Mary Washington Stewart Borie and Paula Browning Denckla, *pray* that, in the event the relief sought in defendants' Cross-Claim against defendant, Delaware Trust Company, is not granted,

THIS COURT DECREE AS FOLLOWS:

1. That a money judgment be entered against Elizabeth Donner Hanson, individually and as executrix of the Last Will and Testament of Dora Browning Donner, deceased, in the amount of \$417,000.00 with interest thereon from January 7, 1953, as to \$17,000.00 and with interest thereon from March 30, 1953, as to \$400,000.00 in favor of Delaware Trust Company, a corporation of the State of Delaware, Trustee of a certain trust dated August 6, 1940, No. 8555, for the benefit of Katherine H. R. Denckla Ordway to the extent of one-half of said money judgment and in favor of Elizabeth Donner Hanson, Trustee under the Last Will and Testament of Dora Browning Donner to the extent of the remaining half of said money judgment.

2. Such other and further relief as may be appropriate and necessary.

Cross-Claims Against Defendants, Delaware Trust Company and Wilmington Trust Company.

1. Dora Browning Donner died a citizen and resident of Palm Beach County, Florida, on November 20, 1952, leaving a Last Will and Testament dated December 3, 1949, a copy of which is attached to the complaint herein as Exhibit A. Said Will was duly admitted to probate in the County Judge's Court in and for Palm Beach County, Florida, on December 23, 1952. At the time of her death, and at all times subsequent to January, 1944, decedent, Dora Browning Donner was and had been a resident of and domiciled in Palm Beach County, Florida, and up to the date of her death, decedent paid intangible taxes assessed in Palm Beach County, Florida, upon all of the intangibles forming a part of the assets deposited with Wil-

mington Trust Company, Wilmington, Delaware, under an agreement described in the next paragraph hereof.

2. On March 25, 1935, said Dora Browning Donner executed an agreement with the Wilmington Trust Company, Wilmington, Delaware, a copy of which is Exhibit B attached to the complaint filed herein. The cash and securities referred to in said agreement were deposited with the said Wilmington Trust Company, as will more fully appear by reference to both the complaint and answer filed herein. By virtue of the terms thereof and the powers retained by the said Dora Browning Donner and the manner in which the terms thereof were carried out, said agreement constituted an agency agreement terminable at any time by the said Dora Browning Donner or by her death.

3. With respect to the said agreement dated March 25, 1935, at the time it was entered into and until the death of Dora Browning Donner, no present interest passed to any beneficiary other than the said Dora Browning Donner. Said agreement was revocable at all times by the said Dora Browning Donner, and at all times during its existence, said Dora Browning Donner retained all powers over the management, investment, and reinvestment of the fund held by Wilmington Trust Company under said agreement and had complete control over the securities constituting said fund. Wilmington Trust Company at no time exercised any independent judgment with respect to said fund.

4. On or about December 3, 1949, Dora Browning Donner purported to execute an alleged power of appointment allegedly pursuant to the terms of the agreement of March 25, 1935, which said alleged power of appointment is attached as Exhibit C to the complaint filed herein. Said alleged power of appointment

was executed by Dora Browning Donner at a time when she was a citizen of and domiciled in Palm Beach County, Florida. Said alleged exercise of the power of appointment was testamentary in character and was not to take effect until after the death of the said Dora Browning Donner and was not executed in the manner required by the law of Florida for testamentary dispositions, as appears in paragraph 21 of the answer of these defendants filed herein.²

5. By reason of the facts set out in the foregoing paragraphs 1 to 4 inclusive, the purported exercise of the power of appointment of December 3, 1949, was and is invalid and of no force or effect, and the agreement of March 25, 1935, between Dora Browning Donner and the Wilmington Trust Company terminated on the date of her death, November 20, 1952.

6. Said Wilmington Trust Company, contrary to the provisions of the Last Will and Testament of Dora Browning Donner, paid out the sums of money mentioned to the persons set out in paragraph 15 of the complaint filed herein and as admitted in paragraph 4 of the answer of the Wilmington Trust Company filed herein.

7. On March 30, 1952, Delaware Trust Company received from the Wilmington Trust Company the securities and cash having a value in the amount of \$400,000.00 which they now hold as Trustee under Trust No. 9022 dated November 26, 1948, created by Elizabeth Donner Hanson and Trust No. 9023 dated November 26, 1948, created by Elizabeth Donner Hanson, said \$400,000.00 in securities and cash being divided at the time of receipt equally between said two trusts.

WHEREFORE, defendants, Dora Stewart Lewis, Mary Washington Stewart Borie, and Paula Browning Denckla, pray as follows:

1. That Delaware Trust Company be ordered to account for the securities and cash received from Wilmington Trust Company and placed in Trusts Nos. 9022 and 9023, together with all profits, income and increment arising therefrom, and be directed to transfer the same under the provisions of the Last Will and Testament of Dora Browning Donner.

2. That, in the event the relief sought above against defendant, Delaware Trust Company, is not granted, that a money judgment be entered against Wilmington Trust Company, Wilmington, Delaware, in the amount of \$417,000.00 with interest thereon from January 7, 1953, as to \$17,000.00 and with interest thereon from March 30, 1953, as to \$400,000.00, in favor of Delaware Trust Company, a corporation of the State of Delaware, Trustee of a certain trust dated August 6, 1940, No. 8555, for the benefit of Katherine N. R. Denckla Ordway to the extent of one-half of said money judgment, and in favor of Elizabeth Donner Hanson, Trustee under the Last Will and Testament of Dora Browning Donner to the extent of the remaining half of said money judgment.

3. Such other and further relief as may be appropriate and necessary.

/s/ JOSIAH MARVEL, A.B.L.

/s/ ARTHUR G. LOGAN

/s/ AUBREY B. LANK

Attorneys for Defendants as above
400 Continental American Building
Wilmington, Delaware

COMPLAINT FILED IN FLORIDA.

IN THE CIRCUIT COURT OF THE FIFTEENTH JUDICIAL
CIRCUIT IN AND FOR PALM BEACH COUNTY, FLORIDA
IN CHANCERY

KATHERINE N. R. DENCKLA, individually, and ELWYN L. MIDDLETON, as guardian of the property of DOROTHY BROWNING STEWART, also known as as Dorothy B. Stewart and Dorothy B. Rodgers Stewart, an incompetent person,

Plaintiffs

v.

WILMINGTON TRUST COMPANY, a Delaware corporation; LOUISVILLE TRUST COMPANY, a Kentucky corporation; DELAWARE TRUST COMPANY, a Delaware corporation; BRYN MAWR HOSPITAL, a Pennsylvania corporation; THE DONNER CORPORATION, a Pennsylvania corporation; BENEDICT H. HANSON: JOHN STEWART: DORA BROWNING STEWART LEWIS: MARY WASHINGTON STEWART BORIE: MIRIAM V. MOYER: JAMES SMITH: DORA DONNER IDE: PAULA BROWNING DENCKLA: WILLIAM DONNER DENCKLA: WILLIAM DONNER ROOSEVELT: DONNER HANSON: JOSEPH DONNER WINSOR: WALTER HAMILTON: ELIZABETH DONNER HANSON, individually and as executrix of the will of DORA BROWNING DONNER, deceased,

No. 31,980

Defendants

**BILL FOR DECLARATORY DECREE
TO THE ABOVE STYLED COURT, AND TO THE
HONORABLE JUDGES THEREOF:**

The above named plaintiffs bring this bill for declaratory decree against the above named defendants, and respectfully allege:

1.

The defendant, Wilmington Trust Company, is a Delaware corporation with its principal office and place of business in Wilmington, Delaware.

The defendant, Louisville Trust Company, is a Kentucky corporation with its principal office and place of business in Louisville, Kentucky.

The defendant, Delaware Trust Company, is a Delaware corporation with its principal office and place of business in Wilmington, Delaware.

The defendant, Bryn-Mawr Hospital, is a Pennsylvania corporation with its principal office and place of business in Bryn-Mawr, Pennsylvania.

The defendant, The Donner Corporation, is a Pennsylvania corporation with its principal office and place of business at 1710 Fidelity Trust Building, Philadelphia, Pennsylvania.

Diligent search and inquiry have been made to discover the true names, domiciles, principal places of business, and status of said foreign corporation, and the same are set forth above in this bill for declaratory decree as particularly as are known to the plaintiffs and to the affiant making the affidavit by which this bill for declaratory decree is verified. Diligent search and inquiry have also been made to discover the names and whereabouts of all persons upon whom service of process would bind said corporations, and the same are specified as particularly as are known to the plain-

tiffs and said affiant. Said corporations are not qualified to do business in the state of Florida and none of the officers, directors, general managers, cashiers, resident agents and business agents of said corporations can be found within the state of Florida, and for this reason constructive service of process is sought upon said corporations, as provided by the statutes of the state of Florida.

The above-named corporate defendants are named as defendants in their individual corporate capacities and as trustees representing various trusts as disclosed by this bill for declaratory decree, in order that they may be bound by any decree entered by this court, not only in their capacities as trustees, but also in their individual corporate capacities.

The defendant, Benedict H. Hanson, is a resident of the state of New York, now residing at 510 Park Avenue, New York, N.Y., Apartment B 4.

The defendant, John Stewart, is a resident of the state of Pennsylvania, now residing on Beachwood Road, Rosemont, Pennsylvania.

The defendant, Dora Browning Stewart Lewis, is a resident of the state of Maryland, now residing at 7000 Glendale, Chevy Chase, Maryland.

The defendant, Mary Washington Stewart Borie, is a resident of the state of Ohio, now residing at 6912 Madisonville Road, Marimont, Cincinnati, Ohio.

The defendant, Miriam V. Moyer, is a resident of the state of Pennsylvania, now residing at 1719 Fidelity Trust Building, Philadelphia, Pennsylvania.

The defendant, James Smith, is a resident of the state of Pennsylvania, now residing at 221 Williams Road, Rosemont, Pennsylvania.

The defendant, Dora Donner Ide, is a resident of the state of New York, now residing at 485 Park Avenue, New York, N.Y.

The defendant, Paula Browning Denckla, is a minor, now twenty years of age. She resides at 5 East 6th Street, New York, N.Y.

The defendant, William Donner Denckla, is a minor, now nineteen years of age. He resides at 5 East 6th Street, New York, N.Y.

Said two minors, Paula Browning Denckla and William Donner Denckla, are the children of the plaintiff, Katherine N. P. Denckla.

Diligent search and inquiry have been made to discover the names and residences of the above named non-resident defendants, and the same are set forth above in this bill for declaratory decree as particularly as are known to the plaintiffs and to the affiant making the affidavit by which this bill for declaratory decree is verified. Constructive service of process on said non-resident defendants is sought, as provided by the statutes of the state of Florida.

The defendant, William Donner Roosevelt, is a resident of Palm Beach, Florida, and is more than twenty-one years of age.

The defendants, Donner Hanson and Joseph Donner Winsor, are both minors, and they reside in Palm Beach County with their mother, Elizabeth Donner Hanson, on South Ocean Boulevard, Palm Beach, Florida.

The defendant, Walter Hamilton, is a resident of Palm Beach County, Florida, and is more than twenty-one years of age.

The defendant, Elizabeth Donner Hanson, is made a party defendant individually and as executrix of the Will of Dora Browning Donner, deceased. The said Elizabeth Donner Hanson is a single woman residing on South Ocean Boulevard, Palm Beach, Florida, and is a resident of Palm Beach County, Florida.

2.

Dora Browning Donner died a citizen and resident of Palm Beach County, Florida, on November 20, 1952, leaving a Last Will and Testament dated December 3, 1949, a copy of which is hereto attached and made a part hereof and marked Exhibit "1". Said will was duly admitted to probate in the County Judge's Court in and for Palm Beach County, Florida, on December 23, 1952. At the date of her death and at all times subsequent to January 15, 1944, decedent had been a resident of and domiciled in Palm Beach County, Florida. Prior to taking up her domicile in Florida, she had been a resident and citizen of the State of Pennsylvania, and had been a resident of that state since prior to 1935. At all times subsequent to January 15, 1944 and up to the date of her death, decedent paid intangible taxes assessed in Palm Beach County, Florida, upon all of the intangibles forming a part of the assets of the trust described in the next paragraph of this bill for declaratory decree.

3.

On March 25, 1935, said Dora Browning Donner, then residing in Villa Nova, Pennsylvania, executed a trust agreement in which the defendant, Wilmington Trust Company, a Delaware corporation, was named as trustee. A copy of said trust agreement is hereto attached and made a part hereof and marked exhibit 2. Said trust agreement, under its terms existed only for the life of the said Dora Browning Donner, and it provided that at her death the trust property described in said trust agreement would be disposed of as provided under the terms of her last will and testament, unless prior to her death she had executed a valid power of appointment making a different disposition

of part or all of the trust property described in schedule "A" attached to said trust agreement.

Said trust agreement contained the following provision:

"1. Trustee shall hold, manage, invest, and re-invest the trust fund, collect the income thereof and pay out of such income all taxes, charges and expenses payable thereout including compensation to Trustee as hereinafter provided.

Trustee shall pay over the net income of the trust fund unto Trustor, for and during the term of her natural life. Upon the death of Trustor Trustee shall assign, transfer, convey and deliver this trust fund, principal and undistributed income thereof, if any, free from this trust, unto such person or persons and in such manner and amounts and upon such trusts, terms and conditions as Trustor shall have appointed by the last instrument in writing which sh shall have executed and delivered to Trustee, or failing such instrument, by her last Will and Testament, or in default of any such appointment then unto the then living issue of Trustor, per stirpes and not per capita."

4.

Said Dora Browning Donner attempted to exercise the power of appointment reserved, as shown in the above quotation, and executed an alleged power of appointment, dated April 6, 1935, a copy of which is hereto attached and made a part hereof and marked exhibit 3. By the terms of said alleged power of appointment the said Dora Browning Donner attempted

to provide for certain payments to be made to her executors and also

\$ 5,000.00 to be paid to the defendant, Bryn-Mawr Hospital;

\$10,000.00 to be paid to the defendant, John Stewart;

\$10,000.00 to be paid to Louisville Trust Company, as trustee, for the benefit of the defendant, Dora Browning Stewart, now Dora Browning Stewart Lewis;

\$10,000.00 to be paid to Louisville Trust Company as trustee, for the benefit of the defendant, Mary Washington Stewart, now Mary Washington Stewart Borie;

\$10,000.00 to be paid to the defendant, Louisville Trust Company, as trustee, for the benefit of the defendant, Paula Browning Denckla;

\$10,000.00 to be paid to the defendant, Louisville Trust Company, as trustee, for the benefit of the defendant, William Donner Denckla;

\$10,000.00 to be paid to the defendant, Louisville Trust Company, as trustee, for the benefit of the defendant, William Donner Roosevelt;

\$10,000.00 for each grandchild of said trustor, Dora Browning Donner, born after the date of said alleged power of appointment, April 6, 1935;

and the balance of said trust to be divided into two equal parts, to be paid one-half to the defendant, Wilmington Trust Company, as trustee, for the benefit of the plaintiff, Katherine N. R. Denckla, who was named in the will of the deceased as Katherine N. R. Denckla Ordway, but whose name is now Katherine N. R. Denckla, and the other one-half to the defendant, Wilmington Trust Company, as trustee, for the benefit

of the defendant, Dorothy Browning Stewart, all as shown by said alleged power of appointment above described as exhibit 3 and attached to this bill for declaratory decree and made a part hereof.

5.

By virtue of said power retained by the said Dora Browning Donner in the trust instrument dated March 25, 1935, which provided that the last instrument in writing executed by her as a power of appointment would control the disposition of said trust assets, she again attempted to exercise her power of appointment on October 11, 1939, and in said attempted power of appointment she revoked and cancelled paragraph C of the power of appointment dated April 6, 1935, providing \$10,000.00 for the defendant, John Stewart, and increased the amount for said John Stewart to \$15,000.00 and added \$1,000.00 for James Smith. A copy of said alleged power of appointment is hereto attached and made a part hereof and marked exhibit 4.

6.

Thereafter, the said Dora Browning Donner again attempted to exercise said alleged power of appointment contained in said trust instrument dated March 25, 1935, providing that the last instrument in writing executed by her would control said trust assets, and she executed an alleged power of appointment designated "*Donner * First Power of Appointment*," dated December 3, 1949. In this alleged power of appointment she revoked all previous exercises of said power of appointment, the same being those above mentioned, dated April 6, 1935, and later amended by the one dated October 11, 1939. She then provided in said alleged power of appointment, designated as "*Donner * First Power of Appointment*," for the disposition of said trust assets as follows:

- \$ 2,000.00 to the defendant, Miriam V. Moyer;
- \$ 1,000.00 to the defendant, James Smith;
- \$ 1,000.00 to the defendant, Walter Hamilton;
- \$ 1,000.00 to each of her servants who had been in her employ for more than two years at the time of her death;
- \$ 10,000.00 to the defendant, Louisville Trust Company, as trustee, for the benefit of the defendant, Benedict H. Hanson;
- \$ 10,000.00 to the defendant, Bryn Mawr Hospital, Bryn Mawr, Pennsylvania, to endow a bed in honor of Dorothy B. Rodgers Stewart;
- \$200,000.00 to the defendant, Delaware Trust Company, as trustee, for the benefit of Joseph Donner Winsor;
- \$200,000.00 to the defendant, Delaware Trust Company, as trustee, for the benefit of the defendant, Donner Hanson.

Said alleged power of appointment then provided that the residue of the principal and undistributed income of said trust should be paid to the executrix of the last will and testament of the said Dora Browning Donner. A copy of said alleged power of appointment, described as "Donner * First Power of Appointment," is hereto attached and made a part hereof and marked exhibit 5.

7.

Thereafter, the said Dora Browning Donner, by reason of the provision in said trust instrument, dated March 25, 1935, providing that the last instrument in writing which she should execute would control the disposition of said trust assets, again attempted to exercise said alleged power of appointment by executing a written instrument, dated July 7, 1950, and

designated "*Donner ' Second Power of Appointment.*" In this alleged power of appointment she revoked the \$10,000.00 to the defendant, Louisville Trust Company, as trustee, for the benefit of her son-in-law, Benedict H. Hanson, and she confirmed her alleged power of appointment dated December 3, 1949, in all other respects. A copy of said last alleged power of appointment is hereto attached and made a part hereof and marked exhibit 6.

8.

The defendant, Elizabeth Donner Hanson, is the executrix of the will of said deceased, a copy of which is attached to this bill for declaratory decree as exhibit 1, and she is made a party defendant for the purpose of binding her as such executrix, and also binding her individually as to any rights that she may have as a result of the will, the trust agreement, and the alleged powers of appointment here inabove mentioned.

Dora Donner Ide is made a party defendant by reason of the fact that she is named as a legatee in said will and in order to bind her by the terms and provisions of the decree to be entered in this case pertaining to the will, the trust instrument, and the powers of appointment hereinabove mentioned.

The Donner Corporation, a Pennsylvania Corporation, is made a party defendant by reason of the fact that item *Eight's* of said will names it as the sole adviser of the trustee for the trust created in said will, and in order that it may be bound by the terms of the decree to be entered in this case with reference to said will, trust agreement, and powers of appointment hereinbefore mentioned.

In item I of the first alleged power of appointment, dated April 6, 1935, and attached as exhibit 3 to this

bill for declaratory decree, the trustor provided \$10,000.00 for each grandchild of the trustor born after April 6, 1935. Plaintiff alleges that all grandchildren born to said trustor after that date have been made parties defendant in this case.

In item (iv) of the power of appointment known as "Donner • First Power of appointment," dated December 3, 1949, attached as exhibit 5 to this bill for declaratory decree, provision is made for \$1,000.00 to be paid to each servant who shall have been in the employment of the trustor, Dora Browning Donner, for a period of more than two years prior to her death. Plaintiffs allege that there are no such servants, and for that reason none are made parties defendant in this case.

9.

Plaintiffs allege that questions and doubts have arisen, concerning what property passes under the residuary clause of the Last Will and Testament of the decedent, Dora Browning Donner, particularly that part of the residuary clause which purports to cover property over which the decedent had powers of appointment and which she had failed to exercise effectively in her lifetime. If, as to the trust described in paragraph numbered 3 of this bill for declaratory decree, the decedent, during her lifetime, effectively and validly exercised powers of appointment thereunder, only a portion of property in such trust passes under the residuary clause. If, on the other hand, one or more of the exercises of power of appointment shown on Exhibits 3, 4, 5, and 6, attached to this bill for declaratory decree, were ineffective or invalid for any reason, then additional portions of the trust property passes under the residuary clause of the decedent's will.

In this connection plaintiffs respectfully allege that each of the several alleged exercises of powers, shown on exhibits 3, 4, 5, and 6, attached to this bill for declaratory decree, is testamentary in character and each provides it is not to take effect until after the death of the settlor the said Dora Browning Donner. Thus, since each is testamentary in form, each must be executed in the manner required by the applicable law for testamentary dispositions. Questions have arisen as to which is the proper law to be applied; whether the law of Pennsylvania where the settlor resided at the time the trust was created and at the time the first two of the exercises were made, or the law of Florida to which she later moved her domicile and where she exercised the last two alleged powers of appointment above mentioned, or the law Delaware where the trustee has its place of business, the law of each of such states varying on the point in question, Florida and Delaware requiring two witnesses for testamentary dispositions and Pennsylvania none. Revocation of a testamentary instrument may also be made under the laws of Pennsylvania by an unattested written instrument signed by a testator. In the case of each of the exercises here in question, there was only one witness.

Unless the Court shall by its decree determine what portion of the trust property passes under the residuary clause of the decedent's will, plaintiffs are without remedy; similarly, if any such exercises are invalid, whereby certain property of the trust become assets of the residuary estate of the decedent, it is important to capture the same for the benefit of the estate prior to the discharge of the defendant executrix who has filed to take any steps to do so, and who takes the position that all of such exercises are valid and fully effective.

WHEREFORE, Plaintiffs, pray:

1. That the Court construe and determine the question of what portion of the trust property involved herein passes under the residuary clause of the will of the decedent.
2. That the Court grant such further or supplemental relief as may be necessary or proper.

C. ROBERT BURNS
Harvey Building
West Palm Beach, Florida
REDFEARN & FERRELL
By D. H. REDFEARN
Attorneys for Plaintiffs
550 Brickell Avenue
Miami, Florida.

ELWYN L. MIDDLETON, being sworn by me, the undersigned officer, says on oath that the statements contained in the foregoing bill for declaratory decree are true.

ELWYN L. MIDDLETON.

Sworn to and subscribed before me this 21st day of January, 1954.

LOUISE A. KRONENBERGER

FLORIDA DECREE.

Chanc.

Orders 234 Page 632

IN THE CIRCUIT COURT OF
THE FIFTEENTH JUDICIAL
CIRCUIT OF FLORIDA, IN AND
FOR PALM BEACH COUNTY.
IN CHANCERY.

KATHERINE N. R. DENCKLA,
etc., et al.,

Plaintiffs

-vs-

WILMINGTON TRUST COMPANY, a
Delaware corporation, et al.,

Defendants

No. 31,980.

SUMMARY FINAL DECREE.

This cause was duly presented by counsel for the parties upon motion for Summary Final Decree filed by plaintiff November 19, 1954 and Motion for Summary Decree filed by certain defendants on December 3, 1954.

Only questions of law are presented. The facts are simple and undisputed. No useful purpose would be served in stating them.

Two principal questions are presented, first, jurisdiction as against those whom a decree pro confesso has been entered; secondly, the authority of an executrix of a Florida will concerning certain assets now

located in Delaware and purported to be held under a declaration of trust and power of appointment executed by the testator.

As to jurisdiction, the trust assets and the trustees are in Delaware. No personal service has been had upon the defendants who failed to answer. The inclusion of the trust assets in her inventory, and an allowance of counsel fees and compensation for the executrix, although such an inclusion was later sought to be withdrawn, does not of itself give this court jurisdiction over these assets in Delaware or the Trustees. Hence, this court considers that it has no jurisdiction over the non-answering defendants.

Concerning the declaration of trust dated March 25, 1935, and particularly the power of appointment dated December 3, 1949, no present interest passed to any beneficiary other than the Trustor (Testatrix). It seems clear to me, from the authorities, that the power of appointment was testamentary in character and did not constitute a valid inter vivos trust appointment. As the appointment had only one subscribing witness, rather than two, as required in Florida, it did not constitute a valid testamentary disposition. Hence, the executrix should receive the assets and dispose of them agreeable to the will under which she was appointed.

THEREUPON, IT IS ORDERED that this cause be dismissed, without prejudice, as to the non-answering defendants; that the Motion filed February 18, 1954, and the Motions for Summary Final Decree be granted to the extent embraced in this decree, and in other respects denied.

IT IS FURTHER ORDERED AND DECREED that, as to the parties now before the court, the assets held under the provisions of the trust agreement dated

March 25, 1935, between the decedent, Dora Browning Donner, and Wilmington Trust Company, as Trustee, and additions thereto, passed under the will of Dora Browning Donner, dated December 3, 1949, and disposition thereof is determined by the residuary clause of the will, which was admitted to probate in the County Judge's Court, in Palm Beach County, December 23, 1952.

IT IS FURTHER ORDERED that this court retain jurisdiction for the purpose of enforcing this decree and the settlement of any other questions that may properly arise in connection herewith, all with costs taxed against the executrix.

Copy furnished counsel.

DONE AND ORDERED this 14 day of January, A.D. 1955.

C. E. Chillingworth
Circuit Judge

**EXCERPTS FROM AFFIDAVIT OF MANLEY P.
CALDWELL.****(Dated March 30, 1955.)**

I am an attorney at law, practicing in Palm Beach County, Florida. I am one of the attorneys for Elizabeth Donner Hanson, individually, and as Executrix of the Will of Dora Browning Donner, deceased, and as guardian ad litem for Donner Hanson and Joseph Donner Winsor, and William Donner Roosevelt, individually, in that certain cause pending in the Circuit Court of Palm Beach County, Florida, In Chancery No. 31,980, styled Katherine N. R. Denckla, individually, et al, Plaintiffs, v. Wilmington Trust Company, a Delaware corporation, et al, Defendants.

On March 11, 1955 appeal was entered to the Supreme Court of Florida from summary final decree in the above case dated January 14, 1955.

* * *

EXCERPTS FROM AFFIDAVIT OF JOHN N. FARRELL.

(Dated April 18, 1955.)

I am an attorney at law, practicing in West Palm Beach, Palm Beach County, Florida. I am one of the attorneys for ELWYN L. MIDDLETON, as guardian of the property of Dorothy B. R. Stewart, in that certain cause pending in the Circuit Court in and for Palm Beach County, Florida, in Chancery Case No. 31980, entitled "KATHERINE N. R. DENCKLA, individually, et al., plaintiffs, versus WILMINGTON TRUST COMPANY, a Delaware corporation, et al., defendants".

* * *

Affiant has read the affidavit of Paul D. Lovett dated March 13, 1955, and particularly that portion thereof referring to the finding in the summary final decree entered in the above cause to the effect that the Florida court lacked jurisdiction over certain non-answering defendants. Appellees, on the 28th day of March, 1955, filed a cross assignment of error in said appeal, in words and figures as follows, to wit:

"CROSS ASSIGNMENT OF ERROR

"Come now the appellees, KATHERINE N. R. DENCKLA, individually, and ELWYN L. MIDDLETON, as guardian of the property of DOROTHY BROWNING STEWART, also known as Dorothy B. Stewart and Dorothy B. Rodgers Stewart, an incompetent person, and file this their assignment of error relating to the notice of appeal filed herein on March 11, 1955.

"1. The Court erred in its summary final decree dated January 14, 1955, in holding that it had no jurisdiction over the non-answering defendants."

The purpose of such cross assignment of error is to have the Supreme Court of Florida pass upon the contention of appellees that the Florida court, for the purposes of said suit, did have jurisdiction over the non-answering defendants in accordance with the provisions of Chapter 87, Florida Statutes 1953, relating to declaratory decrees, judgments and orders, and the provisions of Chapter 48, Florida Statutes 1953, relating to constructive service of process.

* * *

AFFIDAVIT OF JOSEPH W. CHINN, JR.

(Filed November 18, 1954.)

1. That at all times hereinafter mentioned, I have been an officer of the Wilmington Trust Company of Wilmington, Delaware, and I am presently a vice-president and trust officer thereof.

2. That on or about March 25, 1935, the Wilmington Trust Company (hereinafter "Trustee") executed in Wilmington, Delaware, an agreement dated March 25, 1935 between itself as Trustee and Dora Browning Donner (hereinafter "Trust Agreement") which created a trust with respect to securities described in Schedule A attached to the Trust Agreement and such other securities or property as might thereafter be received by the Trustee under the Trust Agreement. Either at the time when the Trust Agreement was executed by the Trustee or prior thereto, the same had been executed by Dora Browning Donner. A copy of the Trust Agreement (with Schedule A thereto) is attached to the complaint which was filed in the above action.

3. At or about the time when the Trust Agreement was executed by the Trustee, Dora Browning Donner assigned, transferred and delivered to the Trustee in Wilmington, Delaware, the securities listed on Schedule A attached to the Trust Agreement. From time to time Dora Browning Donner, acting in accordance with the terms of the Trust Agreement transferred additional sums of money and securities to the Trustee to be held by it under the Trust Agreement. Attached hereto and marked Exhibit A is a statement showing the character of such additions and the times when they were made. The securities initially

and subsequently so delivered were either endorsed or the Trustee received stock powers with respect thereto to the extent, if any, required to vest title thereto, in the Trustee; and the sums of money (represented by checks) subsequently transferred in trust were likewise delivered to the Trustee in Wilmington, Delaware. At no time was title to any of the securities listed in Schedule A or any other securities or property subsequently held in the corpus of the trust transferred by the Trustee to Dora Browning Donner or to anyone else, except (a) such transfers as were made from time to time in accordance with the direction of the advisor or advisors named in or designated pursuant to paragraph 5 (as amended from time to time) of the Trust Agreement, (b) such transfers as were effected subsequent to the death of Dora Browning Donner referred to in paragraph 10 hereof, and (c) the transfer of the \$75,000 to Dora Browning Donner referred to in paragraph 8 hereof.

4. That at all times from and after the establishment of the trust, the Trustee has held the title to the assets comprising the trust either in its own name or in the name of nominees who were at all times under its control, that all of such assets have at all times been located within the State of Delaware, and that all acts of the Trustee in administering the trust have taken place within the State of Delaware.

5. That by letter dated June 29, 1936 Dora Browning Donner nominated and appointed C. K. Baxter, and J. E. Hairsine, or either of them, to act as advisor in lieu of W. H. Donner, the advisor originally named in the Trust Agreement, and by letter dated October 14, 1937 Dora Browning Donner nominated and appointed C. K. Baxter, J. E. Hairsine and John Stewart, or any one of them, as such advisors.

The two letters became effective upon their receipt by the Trustee in Wilmington, Delaware. True and correct copies of such letters are attached hereto and marked Exhibits B and C respectively. By letter dated December 13, 1940, Dora Browning Donner amended paragraph 5 of the Trust Agreement which originally provided that the advisor of the trust should be William H. Donner or such other "person or persons" as Dora Browning Donner should nominate in writing delivered to the Trustee, so as to provide that the advisors should be Donner Estates, Inc., a Pennsylvania corporation, or such other "corporation, person or persons" as Dora Browning Donner might nominate in writing delivered to the Trustee, and to specify the compensation to be paid to "Donner Estates, Inc.," for acting as advisor. By letter dated February 5, 1946, Dora Browning Donner further amended paragraph 5 by changing the compensation to be paid to "Donner Estates, Inc., or any other advisor or advisors hereinafter nominated." Both the letters of December 13, 1940 and February 5, 1946 became effective upon their receipt and acceptance by the Trustee in Wilmington, Delaware. True and correct copies of the letters are attached hereto and marked Exhibits D and E respectively.

6. That the instruments executed by Dora Browning Donner on April 6, 1935, October 11, 1939, December 3, 1949 and July 7, 1950 (Exhibits E, F, C and D to the complaint herein, respectively), under which Dora Browning Donner exercised the power of appointment granted to her by the Trust Agreement became effective upon their delivery to the Trustee in Wilmington, Delaware, on or about the dates indicated by the signature of the Trustee appearing at the bottom of each of such instruments.

7. That although by paragraph 10 of the Trust Agreement Dora Browning Donner reserved the right to amend, alter or revoke the Agreement in whole or in part, the fact is that Dora Browning Donner never attempted to exercise such right, except for the amendments to paragraph 5 dealing with the advisor and its compensation made by the letters of December 13, 1940 and February 5, 1946 (Exhibit D and E hereto), and for the revocation of the trust as to \$75,000 thereof by letter dated April 2, 1947 (Exhibit F hereto).

8. That on or about April 2, 1947 Dora Browning Donner revoked the trust as to \$75,000 thereof (Exhibit F hereto) and the Trustee paid to Dora Browning Donner the sum of \$75,000 from the trust. This same amount was repaid to the Trustee by Dora Browning Donner on December 22, 1947 as a replacement of the amount previously withdrawn. As indicated by her letter dated December 22, 1947 addressed to the Trustee (Exhibit G hereto).

9. That at no time did Dora Browning Donner attempt to direct, suggest, consult with or advise the Trustee with respect to any phase of the administration of the trust, but on the contrary the Trustee performed all of its duties in accordance with its own best independent judgment, except in so far as it followed the instructions of the advisor or advisors acting in accordance with paragraph 5 of the Trust Agreement.

10. That I am advised that Dora Browning Donner died on November 20, 1952, that on that date the Trustee held under the Trust Agreement the assets having the values set forth on Exhibit H attached hereto, and that between January 9, 1953 and March

30, 1953 the Trustee, acting pursuant to instruments executed by Dora Browning Donner on December 3, 1949, and July 7, 1950 (Exhibits C and D attached to the Complaint herein), transferred and delivered the following sums of money to the following:

<i>Date</i>	<i>Amount</i>	<i>Distributed to</i>
January 9, 1953	\$ 2,000	Miriam V. Moyer
January 10, 1953	1,000	Dorothy Doyle
January 12, 1953	1,000	Mary Glackens
January 12, 1953	1,000	Walter Hamilton
January 12, 1953	1,000	James Smith
January 12, 1953	1,000	Ruth Brenner
February 11, 1953	10,000	Bryn Mawr Hospital

That of the aforementioned persons, I am advised that Dorothy Doyle, Mary Glackens, and Ruth Brenner were servants who had been in the employment of Dora Browning Donner for more than two years at the time of her death and hence were the persons entitled under paragraph 2(a)(iv) of the instrument dated December 3, 1949 to the payments so made to them; that on March 30, 1953 the Trustee assigned, transferred and delivered securities and cash having an aggregate value of \$200,000 to the Delaware Trust Company, Trustee under Agreement dated November 26, 1948, with Elizabeth Donner Hanson, for Donner Hanson and others, and received therefor a receipt and release, a copy of which is attached hereto and marked Exhibit I; and that on March 30, 1953 the Trustee assigned, transferred and delivered to the Delaware Trust Company, Trustee under agreement dated November 26, 1948 with Elizabeth Donner Hanson, for Joseph Donner Winsor and others, securities and cash having an aggregate value of \$200,000 and received therefor a receipt and release, a copy of

which is attached hereto and marked Exhibit J; and that on or about February 18, 1954, Trustee deposited the sum of \$455,777.81 in the Wilmington Trust Company for the account of Elizabeth Donner Hanson, Executrix of Dora Browning Donner, in accordance with instructions from William H. Foulk, Esq., whom I am advised was acting as attorney for Elizabeth Donner Hanson, Executrix.

11. That on July 28, 1954 when the complaint in the above action was filed, the Trustee held under the Trust Agreement securities and monies all of which were located within the State of Delaware; and at all times since the institution of the action the Trustee has held securities and cash under the Trust Agreement in Wilmington, Delaware.

12. That the Trustee has no office or other place of business outside of the State of Delaware and transacts no business outside of this state.

13. That the Trust Agreement is one of two trust agreements between Dora Browning Donner and the Wilmington Trust Company under which the latter acted as Trustee, and at no time either before or after March 25, 1935 has Dora Browning Donner had an agency account of any kind with the Wilmington Trust Company.

14. That when assets held under the Trust Agreement were purchased and sold it was not the practice of the Trustee to advise Dora Browning Donner of the transactions, but information as to portfolio changes were given to the advisor periodically every three months as is customarily done by the Wilmington Trust Company as Trustee under many other trusts in giving advice as to investment changes.

15. That during the time when Donner Estates, Inc. (the name of which was subsequently changed to The Donner Corporation) was acting as advisor under paragraph 5 of the Trust Agreement, the individuals who acted on behalf of the corporate advisor in its relations with the Trustee were C. K. Baxter, John Stewart, H. R. Baxter and Edward V. Kruger.

16. That it was not until after January 1, 1954 that Wilmington Trust Company was advised that the validity or effectiveness of the Trust Agreement or the exercises of the power of appointment thereunder by Dora Browning Donner were or would be assailed by Dora Stewart Lewis, Mary Washington Stewart Borie, Paula Browning Denckla, Katherine N. R. Denckla, Elwyn L. Middleton, as guardian of the property of Dorothy B. R. Stewart or by anyone else.

/s/ Joseph W. Chinn, Jr.

Sworn to and subscribed before me the day and year first above written.

/s/ Marion K. Graham
Notary Public

(Notarial Seal)

EXHIBIT A.*Supplements to the Original Corpus*

OMITTED

* * *

EXHIBIT B.**WILLIAM H. DONNER**

1616 Walnut Street

Philadelphia

June 29, 1936

Wilmington Trust Company

Wilmington

Delaware

Gentlemen:

Under my trust, your #2152, which I have established with you, Mr. W. H. Donner is named as the adviser. Since Mr. Donner will be away until October 15th, I wish to nominate and appoint in his place and stead Mr. C. K. Baxter and Mr. J. E. Hairsine, or either of them, who during his absence shall have the right to direct the sale, exchange or disposal of any of the securities or properties held at any time in my trust, and who shall have the right to select or approve any and all investments to be made in connection with the management of the trust estates.

I hereby reserve the right to alter, modify or revoke these instructions.

Yours very truly,

Dora B. Donner.

Specimen Signatures:

C. K. Baxter

J. S. Hairsine

EXHIBIT C.

JOHN E. HAIRSINE

1616 Walnut Street

Philadelphia

October 14, 1937

Wilmington Trust Company,

Wilmington

Delaware

Gentlemen:

In my trust, your #2152, Dora B. Donner, I have the power to nominate and appoint such person or persons who shall have the power to direct the sale, exchange or disposal of any of the securities or properties held at any time in the trust, and the right to select and approve any and all reinvestments to be made in connection with the management of the trust estate.

In the exercise of this power I hereby nominate and appoint Mr. C. K. Baxter, Mr. J. E. Hairsine, and Mr. John Stewart, or any one of them, who shall have the right to direct the sale, exchange or disposal of any of the securities or properties held at any time in the trust, and who shall have the right to select or approve any and all reinvestments to be made in connection with the management of the trust estate.

I hereby reserve the right to alter, modify and revoke these instructions.

Yours very truly,

Dora B. Donner

EXHIBIT D.

December 13, 1940

Wilmington Trust Company
Wilmington, Delaware

In re: Trust No. 2152, Dora Browning Donner

Gentlemen:

On March 25th, 1935, I, as Trustor, did execute and deliver to your company a certain written Trust Agreement wherein I transferred, assigned, and delivered to your company as Trustee upon the terms, conditions, and stipulations and for the uses and purposes therein designated and set forth, certain securities the income and dividends from which were to be paid and distributed by your company as Trustee and in the manner set forth and provided in said Trust Agreement.

In paragraph #10 of said Agreement, I reserved the right "to amend, alter, or revoke this Agreement in whole or in part at any time by written instrument signed by the principal and delivered to the Trustee."

In the exercise of my power, I hereby amend paragraph #5 to read as follows: "The Adviser of the trust shall be Donner Estates, Inc., a corporation organized under the laws of the Commonwealth of Pennsylvania, or such other corporation, person, or persons as the Trustor may nominate in writing delivered to the Trustee during her lifetime, and such other corporation, person, or persons so nominated shall become the Adviser or Advisers of this trust at such time and upon the happening of such conditions as the said Trustor may specify in writing.

Donner Estates, Inc. shall be entitled to receive an annual fee in an amount to be agreed upon by it and the Trustee not to exceed \$400.00, such fee to be charged against the income of the trust."

I hereby ratify and confirm said Trust Agreement dated March 25th, 1935 in all other respects.

IN WITNESS WHEREOF, I, the said Dora Browning Donner, have hereunto set my hand and seal this 13th day of December, A.D. 1940.

Very truly yours,

Dora Browning Donner

EXHIBIT E.

Wilmington Trust Company
Wilmington
Delaware

Trust No. 2152, Dora Browning Donner

Gentlemen:

On March 25, 1935, I, as Trustor, did execute and deliver to your company a certain written Trust Agreement wherein I transferred, assigned, and delivered to your company as Trustee upon the terms, conditions and stipulations and for the uses and purposes therein designated and set forth, certain securities the income and dividends from which were to be paid and distributed by your company as Trustee and in the manner set forth and provided in said Trust Agreement.

In paragraph #10 of said Agreement, I reserved "the right to amend, alter or revoke this agreement in whole or in part at any time or times by written instrument signed by the principal and delivered to Trustee."

In the exercise of my power, under date of December 13, 1940, I amended paragraph #5 of said agreement by designating Donner Estates, Inc., a corporation organized under the laws of the Commonwealth of Pennsylvania, or such other corporation, person, or persons as I might nominate in writing, delivered to the Trustee during my lifetime, as the adviser of the trust; and further provided that "Donner Estates, Inc. shall be entitled to receive an annual fee in an amount to be agreed upon by it and the Trustee not to exceed \$400.00, such fee to be charged against the income of the trust."

2

In the further exercise of my power to amend, alter or revoke said trust agreement, as hereinbefore provided, I hereby further amend paragraph #5 by substituting in lieu of the paragraph hereinabove quoted, the following:

“Donner Estates, Inc., and any adviser or advisers hereinafter nominated as hereinbefore provided, shall be paid for its services out of the income of said trust fund an annual fee based upon \$125.00 on each \$100,000.00 of asset value in the trust. The asset value for this purpose shall be determined to be the mean between the reasonable asset value on January 1 and December 31 of each year. In calculating the compensation on asset value so determined the minimum fee shall be \$125.00 per annum and whenever, on such valuation dates, the asset value exceeds \$100,000.00, the excess over units of \$100,000.00 shall, if less than \$50,000.00 be discharged, and if more than \$50,000.00, shall be regarded as a full unit of \$100,000.00. Said compensation shall be paid out of the income of the trust fund in quarterly instalments on the tenth days of February, May, August, and November in each year, commencing with the calendar year 1946, said quarterly payments to be based on the asset value of the trust for the preceding year. When the asset value and the compensation are finally and accurately determined in the aforesaid manner for any year, any underpayment or overpayment of compensation which may have resulted from quarterly payments based on the prior year's valuation shall be deducted from or added to, as the case may be, the first quarterly payment of the succeeding year. The Trustee may rely conclusively upon certifica-

tions made by said adviser as to the aggregate reasonable value of the trust assets on which its compensation is based, and the Trustee shall in no event be required to recover any overpayment of compensation unless it is possible to do so in the manner hereinbefore provided."

I hereby ratify and confirm said Trust Agreement dated March 25, 1935, in all other respects.

IN WITNESS WHEREOF, I, the said Dora Browning Donner, have hereunto set my hand and seal this 5th day of February 1946.

Very truly yours,

Dora Browning Donner

ACCEPTED:

WILMINGTON TRUST COMPANY

By: Jos. W. Chinn, Jr.
Vice-President

EXHIBIT F.

COPY

Wilmington Trust Company,
Wilmington, Delaware

Your Trust #2152

Gentlemen:

I, the undersigned, in the exercise of the power conferred upon me in Paragraph 10 of that certain trust agreement which I entered into with you on the twenty-fifth day of March 1935 do hereby revoke and terminate said trust with respect to the following described property, constituting part of the property now held subject to said trust, the receipt of which property is hereby acknowledged, and do release and discharge you from any further liability or accountability as Trustee of said property hereby withdrawn:

Seventy-five thousand dollars cash

(\$75,000.00)

IN WITNESS WHEREOF, I have hereunto set my Hand and Seal this Second day of April A.D. 1947.

WITNESS:

/s/ W. H. Donner

/s/ Dora B. Donner (SEAL)

EXHIBIT G.

1710 Fidelity-Philadelphia Trust Building
123 South Broad Street
Philadelphia 9, Pa.

December 22, 1947

COPY

Wilmington Trust Company
Wilmington, Delaware

Attention: Mr. G. P. Bissell, Jr.

Dear Sirs:

I herewith hand you check in the amount of \$75,000.00 drawn to the order of the Wilmington Trust Company.

These funds should be added to my revocable trust number 2152 as a replacement of the funds that I withdrew from this same trust on April 2nd last.

Very truly yours,

/s/ Dora B Donner
(Mrs. Dora B. Donner)

Enclosure

EXHIBIT H.

Assets in Account #2152—Tt. U/A with Dora Browning Donner dated 3/25/35 for Dora Browning Donner

OMITTED

* * *

Market Value as of 11/20/52

* * *

Principal Cash

\$1,466,550.75
27,079.16

EXHIBIT I.

KNOW ALL MEN BY THESE PRESENTS,
That The DELAWARE TRUST COMPANY, a corporation of the State of Delaware, Trustee under Agreement dated November 26, 1948 with Elizabeth Donner Hanson for Donner Hanson, does hereby acknowledge to have received of and from Wilmington Trust Company, a Delaware corporation, Trustee under agreement with Dora Browning Donner dated March 25, 1935, in full payment and satisfaction of all monies, property, debts, credits due or owing to it from Wilmington Trust Company, as such Trustee, in accordance with the terms of the agreement, the following securities and cash:—

400 shs.	Air Associates Inc.	@	8 $\frac{1}{4}$	\$ 3,300.00
	common			
100 "	Blockson Chemical	@	25 $\frac{1}{8}$	2,512.50
	Co. common			
330 "	Citizens Utilities	@	13 $\frac{3}{8}$	4,413.75
	Co. common			
100 "	Colorado Inter-	@	30 $\frac{1}{4}$	3,025.00
	state Gas Co.			
	common			
1,200 "	Connecticut Filter	@	1	1,200.00
	Corp. common			
66 "	Cuno Engineering	@	40	2,640.00
	Corp. common			
720 "	Deep Rock Oil	@	45 $\frac{7}{8}$	33,030.00
	Corp. common			
100 "	Hillsboro Planta-	@	42	4,200.00
	tion, Inc., common			
400 "	Mountain States	@	13 $\frac{1}{2}$	5,400.00
	Power Co. common			

1,000	"	N. Y. Chicago & St. Louis R.R. com.	@	42 $\frac{5}{8}$	42,625.00
50	"	St. Joseph Lead Co. common	@	39-9/16	1,978.13
1,200	"	Savannah Electric & Power Co. com.	@	42 $\frac{1}{2}$	51,000.00
200	"	West Penn Electric Co. common	@	35 $\frac{1}{4}$	7,050.00
48	"	Cuno Engineering Corp. non cum. Class A	@	70	3,360.00
72	"	Hillsboro Plantation, Inc. 5% pfd.	@	100	7,200.00
50	"	Western N. Y. Water Co. non cum. 5% pfd.	@	100	5,000.00
\$14,000		Hillsboro Plantation, Inc. 4% note dated 3/11/49	@	100	14,000.00
3,000		Hillsboro Plantation Inc. 5% note dated 9/1/50	@	100	3,000.00
5,000		Hillsboro Plantation Inc. 5% debenture bonds	@	100	5,000.00
\$65.62		Principal Cash			65.62
					<hr/> \$200,000.00

AND Delaware Trust Company, Trustee as aforesaid, does hereby release and forever discharge the said Wilmington Trust Company Trustee as aforesaid, of and from all actions, suits, accounts and demands whatsoever, for or concerning the said Trusteeship, from the beginning of the world to the day of the date hereof.

IN WITNESS WHEREOF, the said Delaware Trust Company, Trustee as aforesaid, has caused the hand of its Vice President to be hereunto set and its corporate seal, duly attested, to be hereunto affixed, this 30th day of March.A.D. Nineteen Hundred and Fifty-Three, 1953.

DELAWARE TRUST COMPANY

By Paul D. Lovett
Vice President

Attest

Lindsay Greenplate
Assistant Secretary

* * *

KNOW ALL MEN BY THESE PRESENTS, That the DELAWARE TRUST COMPANY, a corporation of the State of Delaware, Trustee under Agreement dated November 26, 1948 with Elizabeth Donner Hanson for Joseph Donner Winsor, does hereby acknowledge to have received of and from Wilmington Trust Company, a Delaware corporation, Trustee under agreement with Dora Browning Donner dated March 25, 1935, in full payment and satisfaction of all monies, property, debts, credits due or owing to it from Wilmington Trust Company, as such Trustee, in accordance with the terms of the agreement, the following securities and cash:—

400 shs.	Air Associates Inc.	@	8 $\frac{1}{4}$	\$ 3,300.0
	common			
100 "	Blockson Chemical	@	25 $\frac{1}{8}$	2,512.50
	Co., common			
330 "	Citizens Utilities	@	13 $\frac{3}{8}$	4,413.75
	Co. common			
100 "	Colorado Inter-	@	30 $\frac{1}{4}$	3,025.00
	state Gas Co. com.			
1,200 "	Connecticut Filter	@	1	1,200.00
	Corp. common			

66	"	Cuno Engineering Corp. common	@ 40	2,640.00
720	"	Deep Rock Oil Corp. common	@ 45 $\frac{7}{8}$	33,030.00
100	"	Hillsboro Plantation, Inc., common	@ 42	4,200.00
400	"	Mountain States Power Co. common	@ 13 $\frac{1}{2}$	5,400.00
1,000	"	N. Y. Chicago & St. Louis R.R. com.	@ 42 $\frac{5}{8}$	42,625.00
50	"	St. Joseph Lead Co. common	@ 39-9/16	1,978.13
1,200	"	Savannah Electric & Power Co. common	@ 42 $\frac{1}{2}$	51,000.00
200	"	West Penn Electric Co. common	@ 35 $\frac{1}{4}$	7,050.00
48	"	Cuno Engineering Corp. non cum. Class A	@ 70	3,360.00
72	"	Hillsboro Plantation, Inc 5% pfd.	@ 100	7,200.00
50	"	Western N. Y. Water Co. non cum. 5% pfd.	@ 100	5,000.00
\$14,000		Hillsboro Plantation, Inc. 4% note dated 3/11/49	@ 100	14,000.00
3,000		Hillsboro Plantation, Inc. 5% note dated 9/1/50	@ 100	3,000.00
5,000		Hillsboro Plantation, Inc. 5% debenture bonds	@ 100	5,000.00
\$65.62		Principal Cash		65.62
				<hr/> \$200,000.00

/AND Delaware Trust Company, Trustee as aforesaid, does hereby release and forever discharge the said Wilmington Trust Company, Trustee as aforesaid, of and from all actions, suits, accounts and demands whatsoever, for or concerning the said Trusteeship, from the beginning of the world to the day of the date hereof.

IN WITNESS WHEREOF, the said Delaware Trust Company, Trustee as aforesaid, has caused the hand of its Vice President to be hereunto set and its corporate seal, duly attested, to be hereunto affixed, this 30th day of March A.D. Nineteen Hundred and Fifty-Three, 1953.

DELAWARE TRUST COMPANY

By Paul D. Lovett

Vice President

Attest.

Lindsay Greenplaae

Assistant Secretary

EXCERPTS FROM AFFIDAVIT OF C. KENNETH BAXTER.

(Dated November 12, 1954.)

I was graduated from Yale University in 1926. Following my graduation I worked in the securities business with Eastman Dillon & Co. until 1931. Thereafter I was employed until September 1940 as an investment advisor by William H. Donner, the husband of Dora Browning Donner, and/or members of his family and/or companies owned or controlled by them. I thereupon became employed as secretary and treasurer of Donner Estates, Inc., and from time to time thereafter I served as secretary and treasurer of Donner Estates, Inc., as vice president, and since January 1, 1950 as president.

2. Donner Estates, Inc., was incorporated on September 11, 1940 by Dora Donner Ide to act as investment counsel to the trustees under a number of trusts created by William H. Donner and by certain members of his family. Its name was changed to the Donner Corporation on June 5, 1947. Its stock, consisting of 100 shares of par value of \$10.00 each was originally owned by Dora Donner Ide (a daughter of William H. Donner and Dora Browning Donner). On or about October 28, 1940, Dora Donner Ide transferred the shares of Donner Estates, Inc., to the Wilmington Trust Company as trustee for the benefit of the issue *per stirpes* and not *per capita* of William H. Donner. The "issue" were defined in the agreement to include Dorothy B. R. Stewart and Katherine N. R. Denckla who had theretofore been legally adopted by William H. Donner.

3. From 1931 until the present my activities and business and personal relationship with William H. Donner and members of his family were such that I became intimately familiar with the terms of and the assets included in the numerous trusts created by William H. Donner and by certain members of his family, as well as the marital and blood relationships which existed in the Donner family.

4. The first wife of William H. Donner was Adella May Newson. They had two children, Robert N. Donner and Joseph W. Donner. Joseph W. Donner in turn had two children, Joseph W. Donner, Jr., and Carroll E. Donner, Jr. I am advised that none of the aforementioned issue of William H. and Adella May Donner are involved in the above litigation.

5. William H. Donner and Adella May Donner were divorced in 1907, and on March 27, 1909, William H. Donner married Dora Browning Rodgers. The latter was the widow of J. Norwood Rodgers who died on January 20, 1905. Dora Browning Rodgers had two children by J. Norwood Rodgers, Katherine N. Rodgers who married Paul Denckla, and Dorothy B. Rodgers who married John Stewart. Paul Denckla and Katherine N. Rodgers Denckla had two children, Paula Browning Denckla and William Donner Denckla. John Stewart and Dorothy B. Rodgers Stewart had two children, Dora Stewart who married Lawrence Lewis, Jr., and Mary Washington Stewart who married David Boyde Borie.

6. Following the marriage of William H. Donner and Dora Browning Rodgers the following children were born to them: Elizabeth Donner, Dora Donner, and William H. Donner, Jr. The latter died without issue. Elizabeth Donner married Elliott Roosevelt and had one child by him, William Donner Roosevelt. Fol-

Following a divorce, Elizabeth Donner married Curtin Winsor and had two children by him, Curtin Winsor, Jr., and Joseph Donner Winsor. Again following a divorce, Elizabeth Donner married Benedict Hanson and by him had one child, Donner Hanson. Dora Donner married John Jay Ide and they have no children. William H. Donner died on November 3, 1953 and Dora Browning Donner died on November 20, 1952.

7. John Stewart, who married Dorothy B. Rodgers; was president of the Donner Corporation from October 1940 to December 31, 1949. Prior to becoming president of the Donner Corporation he had been in the securities business for a period of over fifteen years, first with Cassatt & Co. and later with E. A. Pierce & Co.

8. J. Edward Hairsine was employed by William H. Donner on January 1, 1934, and for a short time as vice president of Donner Estates, Inc., following its incorporation on September 11, 1940. Prior to his employment by William H. Donner, Hairsine had been employed by the Trust Department of the Wilmington Trust Company for a number of years. His principal duties with William H. Donner and Donner Estates, Inc., related to taxation and accounting, but some of his time was devoted to studying investments with William H. Donner and myself. Hairsine severed all connections with the Donner family and Donner Estates, Inc., in 1940 when he was replaced by John Stewart.

9. I am familiar with the fact that Dora Browning Donner entered into an agreement of trust dated March 25, 1935 with the Wilmington Trust Company, as trustee, and I am familiar with the terms of that agreement. The value of the assets transferred to the trustee at the time of the creation of the trust was

approximately \$291,420.85. Prior to December 13, 1940 the persons acting as advisors to the trustee under paragraph 5 of the agreement were successively William H. Donner; Hairsine and myself or either of us; and Hairsine, John Stewart and myself, or any of us. On December 13, 1940 Donner Estates, Inc. was named as advisor under paragraph 5 and thereafter acted in that capacity. The officers of Donner Estates, Inc. (since June 5, 1947, the Donner Corporation) who from time to time were authorized to act on its behalf in performing its functions as advisor under paragraph 5 of the trust agreement dated March 25, 1935 were John Stewart, John E. Hairsine, John T. Lyons, H. R. Baxter, Edgar V. Kruger, W. R. Yarnall and myself. None of such persons, with the exception of John Stewart, were in any way related to Dora Browning Donner. Dora Browning Donner was at no time either an officer, director or stockholder of the corporation.

* * *

(2) **EXCERPTS FROM DEPOSITION OF THE
WITNESS GEORGE P. BISSELL, JR., TAKEN
BY MARVEL DEFENDANTS.**

(December 28, 1954.)

GEORGE P. BISSELL, JR., called as a witness by the Marvel defendants, being first duly sworn by the Notary Public, testified as follows:

DIRECT EXAMINATION

By MR. MARVEL:

Q. Mr. Bissell, will you state for the record your name and address?

A. George P. Bissell, Jr., Greenville, Delaware.

Q. Will you also state your position?

A. Assistant vice president of the Wilmington Trust Company.

Q. How long have you been assistant vice president of the Wilmington Trust Company?

A. Since the summer of 1952.

Q. Were you employed by the Wilmington Trust Company (3) prior to that time?

A. I was, sir.

Q. When were you first employed by the Wilmington Trust Company?

A. July 1, 1942.

Q. And in what department of the Wilmington Trust Company were you employed in July, 1942?

A. In the auditing department.

Q. How long did you remain in that department?

A. Until the spring of 1943.

Q. And you were transferred to another department?

A. Yes, sir, I was, sir, to the trust department under Mr. Bancroft as head of the investment division.

Q. You have remained in the trust department of the Wilmington Trust Company since July, 1943?

A. Yes, sir.

Q. In that department what are your duties generally?

A. My present duties?

Q. Well, let's start back at July, 1943.

A. My duties at that time were confined largely to handling the so-called Donner trusts with us, the proxies and the various trust accounts in the bank, as well as checking brokers' confirmations involving sales and purchases for the (4) trust department.

Q. So as early as July, 1943, you became familiar with the various agreements between the Wilmington Trust Company and the Donner family?

A. That's correct, sir.

* * *

Q. You did familiarize yourself with the terms of that agreement of March 25, 1935, made by Dora Browning Donner?

A. That's correct.

* * *

(5) Q. Can you tell me exactly what if anything you had to do at that time—that is starting in July, 1943—with the securities and investments which were made under the terms of this particular agreement of March 25, 1953?

A. Well, the setup at that time was that the confirmations on sales and purchases in this trust as well as other Donner trusts would come in marked for my attention, with no designation as to the particular trust or trusts involved. Within a day or two of the receipt of those confirmations a letter would be received from The Donner Estates which of course is now The Donner Corporation.

They, as advisor to this particular trust and other Donner trusts, would authorize such sales and pur-

chases to be explained in the confirmations that I had received previously. We would then put the proper trust number on the confirmation and deliver it to our security cage in the case of a sale so that they might make delivery of the securities, and in the case of a purchase so that they might transmit a check to the broker.

Q. Maybe it would simplify things by my asking you this: (6) You stated that you had various numbers on trusts.

A. That's right, sir.

Q. Could you state the number of this particular trust?

A. I can. Trust number 2152.

Q. Hereafter we will refer to this trust as number 2152.

A. All right, sir.

Q. You stated that you received confirmations of orders either for sales or purchases. Do you know who authorized those sales or purchases with respect to trust 2152?

A. The sales or purchases were made by The Donner Corporation and the various brokers. The confirmations would be for the most part—would come to us "The Donner trusts, care of Wilmington Trust Company, Wilmington, Delaware", my attention. We did not execute the orders, sir.

Q. At that time The Donner Corporation, which as you stated prior to 1947 was Donner Estates—

A. Yes, sir.

Q. (Continuing) was the advisor under the terms of this agreement 2152?

A. The Donner Estates was the advisor of that particular trust.

Q. And The Donner Estates and The Donner Corporation are—

(7) A. Are one and the same.

Q. Are one and the same. It was merely a change of name in 1947?

A. In 1947. That's correct.

* * *

(11) Q. Mr. Bissell, you say you received confirmations of any instructions. What do you mean by confirmations of sales or purchases?

A. Well, Mr. Marvel, I think that you may not be talking of the same subject. The confirmations I referred to as brokers' statements.

Q. Yes.

A. We would receive those and within a day or so after the receipt of those brokers' confirmations a letter would be received from Donner Estates authorizing the sale or purchase in the particular trust involved, so that we would know which trust to assign this brokers' statement to. We would have no idea; it would not be designated on the brokers' statement at all.

Q. Yes. Therefore you took no action until you received specific instructions from The Donner Corporation?

A. That's entirely correct.

Q. Did the Wilmington Trust Company initiate the sales or purchases which were reflected in the confirmation slips?

(12) A. No, sir.

Q. Which arrived prior to the instructions?

A. No, sir.

Q. Do you know who did initiate those sales and purchases?

A. I am quite sure that the—one of the several Officers of The Donner Corporation would do that.

Q. Do you know whether it was one of the advisors of this trust.

A. I wouldn't know, Mr. Marvel, because certain men at The Donner Corporation—they specialize in certain, shall we say, investment fields. One man may be responsible for municipals, and another for industrials.

Q. But the fact is that the Wilmington Trust Company didn't initiate any sales, purchases or exchanges of securities that were held in this account?

A. No, sir.

Mr. Steel: You are addressing that question, Mr. Marvel, to what particular period?

By Mr. Marvel:

Q. To the period you know about, and I assume that is the period from July, 1943, to December 28, 1954.

A. Yes, that's correct.

(13) Mr. Marvel: I hand you what I will ask the reporter to mark as exhibit 1.

(Four sheets of paper being forms of The Donner Corporation were marked Exhibit (Bissell) 1.)

By Mr. Marvel:

Q. I hand you exhibit ((Bissell) 1, consisting of four sheets of paper pinned together, and ask you whether you can state what those are.

A. I can state what the top sheet is. This is identical to the letters of authorization, or instructions, I should say, from The Donner Corporation regarding transactions in the trusts here in the Wilmington Trust Company. I have never seen the second copy.

Q. It is obviously a file copy of some sort?

A. It is obviously a file copy of some sort, but I have never seen it, nor have I seen the yellow one.

Q. And the yellow one is similar to the top one?

A. It is, sir.

Q. Confining yourself to the top one which is the one you say you are familiar with and have seen—

A. That's correct.

Q. (Continuing) and is identical with the form on which instructions were sent to the Wilmington Trust Company—

(14) A. That's right.

Q. (Continuing) briefly could you describe, using a hypothetical security, the manner in which those forms came to Wilmington Trust Company?

A. All right. They would be dated. Wilmington Trust Company, Wilmington 99, Delaware, attention G. P. Bissell, Jr. In the left hand column, if the security were purchased by The Donner Corporation, would be a B. If it were a sale, it would be an S symbol. The trust account would be any particular trust that the Donner Corporation has investment control over. Security would be 300 shares of XYZ corporation. Unit price would be \$32 a share. The dollar figure would never be mentioned. It would be the unit price. Broker would be Drexel and Company. It would be signed by an officer of The Donner Corporation.

Q. Upon receipt of such an instruction what would you do?

A. I would secure the confirmation, the broker's confirmation, and write on that trust number so-and-so conforming with the instructions in The Donner Corporation's letter. That broker's confirmation would then be given to our securities cage for them to take over from that time on, it having been initialed by me which would mean that we had the proper authority to carry out the transaction. The cage would rely upon an officer's initials. He would know what authorization (15) is required.

Q. "To carry out the transaction" would be the mechanical procedures necessary to conclude either a

sale or a purchase of the security concerning which you had received instructions?

A. That's right.

Q. In other words you follow through with the mechanical details necessary to carry out those instructions on that form?

A. That would be substantially correct, yes, sir.

Q. And that was true either with respect to a sale or a purchase or an exchange of securities?

A. Yes. A purchase and sale. As to exchange, you mean for example a stock was split two for one, and you had to send off a certificate in exchange to receive back others? I don't follow what you mean.

Q. No, I wasn't thinking of a split in a security as to the number of shares. I will perhaps make it clearer by saying that in a purchase of securities sometimes it was necessary to acquire the money to pay for it, and as a result something, a stock or security, was sold, and the proceeds of that were used to purchase a different type of security.

A. Yes, that happened. Oh, I see what you mean—exchange from one security to another.

Q. That's right.

(16) A. Oh, yes, sir.

Q. Whenever that was done the same form of instruction was sent to you by The Donner Corporation?

A. That's correct.

Q. And you followed out the mechanical details to conform with that, to accomplish that instruction?

A. Yes, sir.

Q. I ask you, did the Wilmington Trust Company by its own act, without instructions from The Donner Corporation during the period from July, 1943, to the present date, sell, purchase or exchange any securities constituting this fund in this agreement number 2152?

A. I can recollect no such transactions as you outline (17) that the Wilmington Trust Company initiated.

Mr. Steel: You mean other than pursuant to instructions?

Mr. Marvel: That was in my question.

Mr. Steel: Yes.

The Witness: I can recall none, sir.

By Mr. Marvel:

Q. In other words you did nothing with respect to the investment of this fund without receiving specific instructions from the advosir?

A. That is my distinct recollection, yes, sir.

Q. Have you any recollection of any time when that did not happen?

A. I do not, no, sir. I think I would recollect, because it would be so unusual—it would not be in accordance with the terms of the agreement—that I think I would recall if it happened.

Q. You do not recall any such instance?

A. I do not recall any such instance.

Q. And you were satisfied that you would have recalled it, had it occurred?

A. I think I would, sir.

Q. Now, Mr. Bissell, these securities which constituted (18) this fund existed in part of common stocks, did they not?

A. Yes, sir.

Q. And those common stocks had the right to vote at meetings of the corporations whose shares they were?

A. Yes, sir.

Q. And consequently it became necessary to determine whether to vote or not to vote those shares at various times?

A. Well, I think it would be better to have our policy on what we did with proxies of the Donner trusts, and this one in particular.

Q. All right. I will let you state for the record exactly what you did with proxies and voting rights which these shares had which were in this fund.

A. From the summer of 1943 to date it has been our policy to execute proxies to—in this case it would be Lack and Lindsay, which are our nominees which we have used since around 1945. To register securities and stocks you would execute a proxy covering X number of shares of XYZ company, and you would forward that executed proxy by letter to the Donner Corporation in Philadelphia, stating to this effect, that we presume that if they wish the shares represented at the meeting to be held on such and such a date, they would forward it directly to the company.

* * *

(19) The Witness: Stating that we presumed if they wished it represented at the meeting they would forward it to the company.

By Mr. Marvel:

Q. In other words, Mr. Bissell, the Wilmington Trust Company did not vote any of these shares at any meetings, did they?

A. No, sir.

Q. Will you describe the manner in which these securities constituting this fund of trust number 2152 were held? In other words, in whose names?

(20) A. All right, sir. From about 1943, the period again that I am familiar with, to around 1945, stocks were registered in the name of Wilmington Trust Company. Some time around 1945 or thereabouts the Legislature enacted into a law that banks might use nominees where the instruments did not specifically authorize you to do it.

Mr. Steel: Specifically, didn't prohibit you from doing it?

The Witness: Didn't prohibit you, yes.

We contacted The Donner Corporation at that time and said that it would certainly be helpful for all concerned if we might register all stocks in the name of Lack and Lindsay, which are good delivery against sale. The stocks registered in the name of Wilmington Trust Company are not good delivery against sale. They must be cleared, as we call it, by a broker before sale could be carried out.

The Donner Corporation said they had no objection to it, and we undertook at that time, which was quite a job, to re-register all securities in 2152. Included in "all securities", naturally in the case of bearer bonds we did nothing, of course.

By Mr. Marvel:

Q. Did The Donner Corporation instruct you specifically to register the shares in the name of Lack and Lindsay?

(21) A. My recollection is that we initiated this by writing them and suggesting that if they had no objections, would they permit us to do it. They said they had no objections at all and if we wanted to do it we could do it as far as they were concerned

Q. Now with respect to the proxy procedures which you have described, did The Donner Corporation instruct you to follow that procedure?

A. Mr. Marvel, all I can say is that it was the procedure being carried out at the time I was broken into this particular job. I do not know.

Q. You don't know where the direction or instruction for doing that came from?

A. I do not, sir.

Q. But the way you have described it is the manner in which it was carried out from the time that you became familiar (22) with it in 1943 to the present date?

A. That's correct, sir.

Q. Did the Wilmington Trust Company prepare any tax returns for Dora Browning Donner with respect to the fund held under 2152?

A. Other than the fiduciary return which is required to be filed by all trustees, I am not aware of any personal tax returns prepared by the Wilmington Trust Company.

Q. So far as you know the Wilmington Trust Company did prepare the required fiduciary return?

A. And that's all, sir, as far as I know.

Q. Now with respect to the income from this fund under 2152, you were required to pay that to Dora Browning Donner?

A. That's correct.

Q. And that is the only person to whom you have forwarded the income?

A. Well, strictly speaking, Mr. Marvel, we did not forward any check to Mrs. Donner as such, but she was the only income beneficiary. That's correct.

Q. How did she receive this income? What were the procedures?

A. The procedure was we remitted income quarterly, but we deposited the income on hand to her checking account with us, (23) and duplicate deposit tickets being sent to the Donner Corporation in Philadelphia.

Q. Did the advisor on this fund during this period from 1943 to date instruct the Wilmington Trust Company as to whether certain expenses or other disbursements should be charged against principal or the

income, or partly against the principal or partly against the income of this fund?

A. Yes. Take for example from time to time the Donner Corporation would enter into agreements with brokerage houses to acquire certain large blocks of stock. There might be additional expenses incurred through the acquisition of the stock other than normal brokerage commissions. They would instruct us as trustee to allocate the additional expenses, and we would usually consult with our tax department to see if they felt that was a proper allocation to income or principal, as the case might be. I don't recall myself any time that our tax department disagreed with the manner in which they had asked us to make these allocations.

. . .

(26) Q. Was your relation and acts taken with respect to this fund 2152 limited solely to the investment angle of the (27) fund?

A. Limited solely to the investment angle, if you include proxies, stock dividends. But nothing to do, in other words, with taxes or anything of that kind.

Q. As I understand it the only taxes were the fiduciary returns, and you did not prepare them?

A. Yes, sir. I had nothing to do with that at all.

Q. But that was the only tax matter?

A. That's all that I know of.

Q. Was there any other person in the trust department of the Wilmington Trust Company who had anything to do with the handling of this fund in accordance with the provisions of the agreement?

A. No more so than I.

Q. In other words you are the one who has more complete knowledge during the period we are discussing than anyone else in the trust department of Wilmington Trust Company?

A. I think that is a fair statement, yes.

Q. Can you state whether you on behalf of the trust department of the Wilmington Trust Company undertook any other acts in the management or handling of this fund other than the ones we have discussed?

A. I recall none, Mr. Marvel.

(28) Q. If the trust department had, would you recall it?

A. I would think I would.

* * *

(28) CROSS-EXAMINATION

* * *

(29) By Mr. Walls:

Q. Mr. Bissell, with respect to voting shares of stock of corporations which were held by this trust number 2152, I understand that the registered holder would sign a proxy and that you would forward this proxy to Donner Corporation in Philadelphia?

A. Yes, sir.

Q. And state that if they wished the shares voted, you presumed they would transmit it direct to the corporation?

A. That's correct. We would send them an executed proxy together with the notice of meeting so that they would be able to determine what matters were to be acted on. We would send it to them.

Q. In such cases as required a vote for or against a proposal such as an annual meeting of stockholders, for or against an increase in capital, or some other such proposal, would you undertake to decide which way to vote that?

A. We would not, sir.

Q. And would you send it in blank?

A. Yes, sir.

Q. So that they could complete the proxy by completing (30) the vote for or against any such proposal?

A. That's correct.

Q. Mr. Bissell, in connection with the investment provisions, I see that it is stated that the trustee shall change investment, only upon the written directions of the advisor or on the written consent of the advisor?

A. Yes. It is consent or direction.

Q. Did the trust company ever request an advisor to consent to a change initiated by you?

A. I can recall none, sir, at all.

Q. Then all such changes were made only upon written directions of the advisor?

A. To my knowledge that's right.

Q. Did you have an investment committee that reviewed investments and trusts?

A. We do have one, yes, sir.

Q. Did you have one in 1943?

A. We did, sir. I was not a member of that committee at that time, however, sir.

Q. Did this committee review the investments in various trusts periodically?

A. Yes.

Q. And as to trusts where there were no advisors did the (31) committee review those investments in those trusts?

A. You are speaking of trusts other than Donner trusts?

Q. Yes.

A. You mean trusts in general?

Q. Yes, in general.

A. If the trust agreement provided that the Wilmington Trust Company was to have sole investment responsibility, we most certainly did review the assets periodically in that particular trust or trusts.

Q. And that would cover living trusts?

A. Yes, sir.

Q. And trusts under will?

A. Yes, sir.

Q. And guardianships?

A. Yes, sir.

Q. And I suppose that would include agency accounts where you make suggestions—

A. If the agency agreement provided that we were to give the account investment supervision, we would.

Q. And these suggestions and advice would emanate from your investment committee?

A. Yes, sir.

Q. Did the investment committee review the investments (32) of this trust number 2152?

A. No, sir.

Q. They never did that to the best of your knowledge since you have been here?

A. Not to the best of my knowledge.

Q. In paragraph 12 dealing with compensation for the trustee, it is stated that the trustee shall receive as compensation for its services blank percentum of the gross income, plus one percentum of the principal on distribution. Do you know what percentage was that was charged?

A. No, I don't.

Q. Do you know if there is an agreement in the file as to that rate?

A. On this particular trust?

Mr. Layton: Is this material, Mr. Walls, to this issue?

Mr. Walls: Yes, this is material, I think, because if a smaller number of duties is required for a trust of this nature, then I think it would be re-

lected in a smaller compensation rate to the trustee.

Mr. Layton: The trust agreement, I submit, speaks for itself.

Mr. Marvel: It doesn't seem to be complete, though, (33) Mr. Layton. I would like to join in that request that we fill in the blanks as to the amount of percentage.

Mr. Layton: We can, of course, secure that for you. I don't have that information offhand.

By Mr. Walls:

* * *

(34) Q. Mr. Bissell, did the trustor, Mrs. Donner, ever withdraw any of this principal?

A. She withdrew, that I recall, the sum of \$75,000.

Q. Can you tell us when that was?

A. It is, I believe, attached to Mr. Chinn's affidavit. Was it 1947 or 1948? It is there. It was restored the same year to the trust.

Q. Was it withdrawn by written instrument?

A. It was, sir.

* * *

(37) REDIRECT EXAMINATION

By Mr. Marvel:

Q. Mr. Bissell, Mr. Steel mentioned Mr. Lindsay and Mr. Lack as nominees of a portion of these securities.

A. Yes, sir.

Q. They of course were not named as such nominees until you received the authorization of The Donner Corporation, were they?

A. In this particular trust, no.

(38) Q. I am only referring to this trust, 2152.

A. Yes.

Q. Now with respect to the mention of a power of veto by the advisors in connection with this trust 2152, did the advisor ever veto any action taken by the Wilmington Trust Company during this period of 1943 to the present time?

A. I can recall none.

Q. Did they have any occasion to or opportunity to veto any action taken by the Wilmington Trust Company during that period?

A. I can't think of any, no—any occasion.

Q. Under Article 4 of the agreement there is a provision reciting in substance that when there shall be no advisor, or if, alternatively, the advisor shall fail to give any written direction or to communicate with the Wilmington Trust Company his consent or disapproval within 10 days after the trustee shall have sent to the advisor a request for some consent, then it says the trustee is authorized to act.

A. We have occasion to use that in other trusts from time to time, of course.

Q. Now my question is: Did you ever have occasion to act in accordance with those provisions in this particular trust, 2152?

(39) A. My distinct recollection is that we did not.

* * *

Q. Do you know if during this period from 1943 to the present date whether there was any lack of advice for this particular fund 2152?

A. No, sir. I don't know of any lack.

Q. And the fact is that with respect to the management of this fund 2152, you on behalf of the trust department of Wilmington Trust Company never exercised any independent judgment?

A. I can recall none.

* * *

- (41) Mr. Layton: Mr. Marvel, do you want to take a look at this letter with respect to the fees allowed the trustee? That in itself you will see is rather inconclusive, but I understand it is actually the fees that have been charged.

Mr. Marvel: Well, Mr. Layton, you have handed me this letter which was written at or about the time of the agreement.

* * *

- (42) The Witness: I have just checked with our payment division, and that fee they have been charging all along, 3% of the income.

Mr. Marvel: All right. Then may we have the record show that the Wilmington Trust Company has produced from their records the fact that 3% on the income collected from the fund in trust 2152 has been the fee received by the Wilmington Trust Company since March 25, 1935, and that to complete paragraph 12 of the copy of the trust agreement attached to the complaint in this action as exhibit B, there be inserted in the blank spot the figure 3%?

Mr. Anderson: Wait a minute before you do that. I don't understand that this was ever inserted in the blank spot on the agreement.

The Witness: I can't say that it was.

* * *

- (43) Mr. Marvel: I think maybe to make the record clear, if we could admit a copy of this letter of March 12, 1935, to Mr. William H. Donner from Walter J. Laird—Mr. Layton, I said perhaps to make the record clear it might be helpful if you would offer the letter of Walter Laird of March

12, 1935, which seems to indicate this figure of 3%, and the authority for it.

- (44) Mr. Layton: I would stipulate to this effect: It is hereby stipulated and agreed among counsel for the respective parties that the fees allowed to the Wilmington Trust Company, trustee of the trust number 2152 are as follows:

3% on the income collected, and a distribution fee of 1% of the principal.

I would further stipulate that those fees have been charged and have been paid.

The Witness: With one exception.

Mr. Steel: And an important exception.

Mr. Layton: Except for the \$75,000, which was a temporary withdrawal.

Mr. Marvel: In 1947?

Mr. Layton: Yes.

- (45) Mr. Marvel: The stipulation is acceptable, Mr. Layton.

Mr. Layton: Is that agreeable to everyone?

(There was no response.)

(Photostatic copy of letter dated March 12, 1935, to William H. Donner from Walter J. Laird was deemed marked Exhibit (Bissell) 2.)

THE DONNER CORPORATION

4710 FIDELITY-PHILADELPHIA TRUST BUILDING

PHILADELPHIA 9, PA.

22

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Treasurer

Secretary

Exhibit A to Bissell Deposition A132-1

(47) **EXCERPTS FROM DEPOSITION OF THE
WITNESS BYE TAKEN BY MARVEL DE-
FENDANTS**

(December 28, 1954.)

ROBERT C. BYE, called as a witness by the Marvel defendants, being first duly sworn by the Notary Public, testified as follows:

DIRECT-EXAMINATION

By Mr. Marvel:

Q. Mr. Bye, will you state for the record your name and address?

A. 910 Blackshire Road, Wilmington.

Q. Where are you presently employed, Mr. Bye?

A. J. A. Montgomery, Incorporated.

Q. And that is in Wilmington, Delaware?

A. Yes.

Q. At one time you were employed by the Wilmington Trust Company, were you not?

A. That's right.

Q. Will you state for the record the period during which you were employed by the Wilmington Trust Company?

A. It has been a long time. I believe I came with the bank in either the latter part of 1936 or the first part of 1937. I don't recall whether it was right before Christmas or immediately after Christmas.

(48) Q. How long did you remain with the Wilmington Trust Company?

A. I remained with the Wilmington Trust Company until, I believe it was, around the first of July, 1943, and then after I got out of the Army I came back for probably about four or five months. I don't recall.

Q. And that was after 1945?

A. Yes. As a matter of fact that was 1946.

Q. When you came back to the bank after your discharge from the service in 1946 what were your duties for that short period of time?

A. That is a good question. I did not return to the trust department. I was in the banking department and the auditing end of it.

Q. But during that period you did not have anything to do with the trust department?

A. No, not a thing.

Q. At any time prior to your enlistment in the service did you have anything to do with the trust department?

A. Yes, I did.

Q. What period was that?

A. I think I went with the trust department in probably the early part of 1939, or it might have been 1938. I am not sure, (49) the investment division, and I was there until I left in 1943.

Q. During that period from 1939, you say, until 1943—is that the period?

A. Yes. It might have been shortly before 1939. I don't know.

Q. Well, 1938 or 1939 to 1943?

A. Yes.

Q. Did you have occasion with your duties in the trust department to become familiar with an agreement between the Wilmington Trust Company and Dora Browning Donner which is dated March 25, 1935, and which has been referred to here as agreement number 2152?

A. Yes, I was not—I did not know the terms of the trust, but I had—did some handling of that particular trust.

Q. And that was during what period, what years?

A. I think very probably the latter part of 1939 until I left the bank in July of 1943.

Q. You were familiar with the fact that the terms of that agreement called for an advisor to the fund which was on deposit here?

A. Yes, I was.

Q. And do you know who that advisor was during that time?

A. There were three people. Mr. Hairsine, when I first (50) started, but he left, apparently left the Donner's shortly after that. And Mr. Baxter.

Q. Do you know Mr. Baxter's initials?

Mr. Steel: Just a minute. He has not finished answering, Mr. Marvel.

Mr. Marvel: All right.

The Witness: Mr. Stewart. I think it was either C. K. or C. J. Baxter.

By Mr. Marvel:

Q. And Mr. Stewart?

A. John Stewart, I believe.

Q. Were there any other advisors during this period which I understand to cover the period from 1939 to 1943 other than those you have mentioned?

A. I believe that Mr. Baxter had a brother who was also an advisor.

Q. It has been some time since you have had occasion to refresh your recollection as to these things? Is that not true?

A. That's right.

Q. I will state for your information that it has been testified here, and it is admitted in the various affidavits, that in 1940 the advisors were changed from these individuals to The Donner Estates, Inc., which later became The Donner Corporation.

(51) Were you familiar with that?

A. I recall, but as I recall Mr. Baxter or Mr. Stewart were signing as officers of that.

Q. As officers of Donner Estates?

A. Yes.

Q. In other words these people first served as advisors in an individual capacity and later as officers of Donner Estates?

A. I think that is correct.

• • •

(52) Q. Now, Mr. Bye, I am going to ask you about the procedure which was followed by you as an employee of the trust department of the Wilmington Trust Company with respect to the purchases, exchanges and sales of securities which constituted this fund under the agreement 2152.

A. Well, when I took over the account or started to work on it, I was told that certain individuals were authorized to direct purchases and sales. I would receive a letter from Mr. Baxter stating that they had purchased or sold certain securities. I would then hold that letter, as I recall it, until confirmations came in from various brokerage houses. I (53) would then check the confirmation against the letter and turn the confirmation over to the securities cage, and they handled it from there on.

Q. Did you ever receive any instructions from anyone in the Wilmington Trust Company as to the securities to be purchased, sold or exchanged?

A. No, sir, I never did.

Q. Those instructions came solely from the advisor of the trust?

A. They were either signed by Hairsine, Baxter or Stewart, as I remember, and they weren't even—I never answered them, as a matter of fact, just held them until the confirmation came in.

Q. But you took no action with respect to this fund until you had received such instructions?

A. Oh, no, sir.

Q. Before you, marked exhibit (Bissell) 1, is a form on the letterhead of the Donner Corporation. I ask you whether that is similar to the form that you received from The Donner Corporation when you were handling this account.

A. No, it was not. I received letters. There was no form.

Q. So that during this period of 1939 to 1943 instructions (54) came to your desk over the signature of an advisor in the form of a letter, rather than in a printed form such as Bissell exhibit 1?

A. That's right, yes.

Q. Was the letter form also used to instruct the Wilmington Trust Company as to the manner that proxies for shares of securities in this fund 2152 should be handled?

A. We were never instructed. We would receive the proxies here and I would have them, as I recall—Lack and Lindsay was our nominee and the securities were in their names, and I would execute the proxies and together with a letter forward them to their office in Philadelphia, to Mr. Baxter.

Q. What would Lack and Lindsay have to do with that?

A. Well, securities were in the name of Lack and Lindsay as I recall it.

Q. In other words you sent a proxy signed by Lack and Lindsay in blank to the advisor in Philadelphia?

A. Well, in blank as far as whether they were going to vote it or not. I never received any notification of whether the proxies were voted or whether they were not voted.

Q. That's right, but the Wilmington Trust Company never voted those shares?

A. No, sir.

(55) Q. Did Wilmington Trust Company during this period of 1939 to 1943 exercise its independent judgment either as to a sale or purchase or exchange of property or as to the manner in which it was to be done, or as to the broker or agent through whom such sales or purchases or exchanges were effected?

A. Not to my knowledge.

Q. In other words in every case of a sale, purchase or exchange of the securities in this fund 2152, it was only done upon the instructions of the advisor?

A. Yes, sir.

Q. During this period, Mr. Bye, with which you are familiar, was any action taken by the Wilmington Trust Company as to the management of this fund 2152 without the instructions of the advisor?

A. Not to my knowledge.

* * *

(56) By Mr. Walls:

Q. Mr. Bye, did you ever seek the consent of the advisors to make any changes?

A. No, sir.

* * *

(57) **EXCERPTS FROM DEPOSITION OF THE
WITNESS FAIRMAN TAKEN BY MARVEL
DEFENDANTS.**

(December 28, 1954.)

ENDSLEY P. FAIRMAN, called as a witness by the Marvel defendants, being first duly sworn by the Notary Public, testified as follows:

DIRECT-EXAMINATION

By Mr. Marvel:

Q. Will you state for the record your name, sir?

A. Endsley P. Fairman.

Q. And your address?

A. 2309 Ridgeway Road, Wilmington.

Q. By whom are you presently employed, Mr. Fairman?

A. Wilmington Trust Company.

Q. How long have you been in the employment?

A. Since 1936, with the exception of the war years.

Q. When did you enlist?

A. In 1942, May.

Q. So that prior to the war your period of employment ended in May, 1942?

A. That's correct.

Q. And I take it that you came back after 1945 or 1946?

A. That's correct.

Q. When did you first come with the Wilmington Trust Company? What was that date?

(58) A. I believe it was approximately the first of June, 1936.

Q. In what department were you employed in 1936?

A. The investment division.

Q. Of the trust department?

A. Of the trust department.

Q. You were in that division from 1936 to 1942?

A. That's correct.

Q. In connection with your duties in that department did you become familiar with the handling of the funds in the trust established by Dora Browning Donner with the Wilmington Trust Company which has heretofore been referred to as trust 2152?

A. I did.

Q. Are you the person who during that period handled the details of that fund?

A. I handled the administration of it.

Q. You handled the administration of that fund?

A. Yes, sir.

Q. You have been here during the testimony of Mr. Bissell and Mr. Bye?

A. I have.

Q. You have heard the manner in which they have described that investments, purchases, sales and exchanges of securities (59) were made?

A. I have.

Q. Did you as the administrator of this fund on behalf of the Wilmington Trust Company during this period 1936 to 1942 undertake any act without instructions of the advisor of this fund?

A. First there would be one correction, Mr. Marvel. I only handled it from 1936 to approximately 1940, or the end of 1939.

Q. Oh, that is when Mr. Bye came in?

(60) A. That's correct.

Q. Oh, then we can shorten this up considerably. In fact, therefore, you only handled this from 1936 to 1939 when Mr. Bye took over?

A. That's right.

Q. Fine. All right. Now we will go back to the question I just asked you, whether on behalf of the Wilmington Trust Company you undertook to complete any administrative detail without the instructions of the advisor of this fund 2152.

A. Well, if I understand your question, we completed no investment detail without the advisor's instructions, but we accepted instructions from the trustor as to who the advisors were. I don't know whether that would be an administrative detail.

* * *

(61) Q. You accepted instructions from Mrs. Donner as to the persons she had designated as advisors of the fund?

A. That's correct.

Q. And you say that is an example of an administrative detail which the advisor did not instruct on?

A. Yes, sir.

Q. I agree with you. Before you is a form which has been marked Bissell Exhibit 1. Was that form used to communicate instructions from the advisor of the fund to the Wilmington Trust Company during this period from 1936 to 1939?

A. It was not.

Q. What was the method of communication of instructions from the advisors to the Wilmington Trust Company at that time?

A. The method was similar to the procedure described by Mr. Bye, which involved our receiving almost simultaneously the confirmations from brokers showing the purchases or sales of securities and also receipt of letters from the advisor of the trust stating that that particular confirmation applied to this particular trust and that he hereby gave us official authorization to act upon it. Now, a good deal of that was co-ordinated also by telephone.

(62) Q. Co-ordinated, but in fact you did not act until you had received the written authorization?

A. That's correct.

Q. But in order to expedite the matter you did communicate by telephone?

A. That's right.

Q. You have heard Mr. Bissell and Mr. Bye testify with respect to the manner in which proxies were handled. Was that procedure followed during the period you handled it, namely 1936 to 1939?

A. It was. The proxies were executed in the name in which the securities were registered, which I believe at that time would have been either Wilmington Trust Company, or Wilmington Trust Company, Trustee, and they were then sent in blank to the advisor with the suggestion that they vote it as they saw fit.

Q. But during this period of 1936 to 1939 Wilmington Trust Company or Wilmington Trust Company, Trustee, or a nominee of Wilmington Trust Company in whose name the shares were registered, did not vote any proxies?

A. They did not. I omitted "nominee" because at that time we did not use nominees.

Q. And that came later for the reasons stated by (63) Mr. Bissell?

A. Yes, sir.

Q. Was this a very active account during this period that you were in charge of it?

A. That is hard for me to answer at this stage, but I would say that it was active.

* * *

(65) Q. I will ask you this question, Mr. Fairman: Was any action taken by you during this period of 1936 to 1939 in (66) connection with the fund number 2152 as to the purchase or sale or exchange of securities?

A. Was it initiated by me?

Q. Was any action ever taken with respect to the sales, purchases or exchange of securities in this fund 2152 without the suggestion of the advisor?

A. It was not taken without the suggestion of the advisor at any time.

Q. And that is also true--

A. If I can be helpful on the point of activity, this is not pinpointing it, but if you mean by "activity", were there transactions in each of the years in which I handled the account, my answer would be yes. I wouldn't remember how many there were.

Q. But you remember in each action that you took with respect to the fund, there was no occasion where an action was taken without the instruction of the advisor?

Mr. Steel: By "action" you mean the investment, or the purchase, sale or exchange?

Mr. Marvel: The purchase, sale or exchange of securities. I am limiting it to that only, Mr. Steel.

The Witness. That is correct.

(67) By Mr. Marvel:

Q. And that is true as you have testified also, with respect to the action taken as to proxies?

A. That also is correct.

* * *

(68) Q. Mr. Bissell testified that that manner of handling the proxies was as a result of a policy. Do you know who created that policy that the proxies should be sent to the advisor in blank for whatever use they decided to make of them?

A. If it was ever put in the form of a policy, I would say it was decided by the head of the invest.

ment division in consultation with the head of the trust department.

Q. Do you know that that policy applied to all other trusts held in the trust department?

A. I do not know that.

Q. Did the head of the trust department establish that policy with respect to this trust 2152 alone?

A. I think not. If I understand Mr. Bissell correctly, I think he was simply talking to you about a policy for handling proxies in the various Donner accounts, a routine basis.

Q. Yes. All I want to know now is, do you know who established that policy?

A. I don't know specifically.

Q. Do you know whether it was the advisor of the fund or an officer in the trust department?

A. I believe it was a suggestion made by an officer in the trust department and approved by the advisor of the fund.

(69) Q. So the advisor consented, they gave their approval to that suggestion?

A. I believe so.

Q. And that was done during this period of 1936 to 1939?

A. I can't tell you when it was reduced to an actual policy, but we handled it in the same manner before any definite policy was set.

Q. But your recollection is that the suggestion was made by the Wilmington Trust Company and the consent and approval of the advisor was obtained?

A. That's right.

Q. Do you know whether it was ever done prior to obtaining the consent or approval of the advisor of the fund?

A. Have we ever voted a proxy without their consent?

Q. Well, I will ask you that, yes, first.

A. I would say the answer to that would be no, because it would be a very unorthodox thing for us to do.

Q. Did you ever vote any of these shares during this period that you are testifying about?

A. Without first sending the proxy to the advisor, no.

Q. You always followed out the procedure of sending the proxy to the advisor during this period?

A. Yes.

(70) Q. Now my question is, did you ever send these proxies in blank to the advisor prior to obtaining the consent or authority of the advisor to do so?

A. I can't exactly answer that question, because I think when we—I am sure when we decided to send them the proxies executed in blank, we had some discussion with them verbally about it before we did it. I don't remember that when it occurred, but I am sure that we didn't just do it without their concurrence in the method.

Q. So it is your recollection that this method of handling the proxies was decided on by a suggestion from the Wilmington Trust Company which was approved by the advisor of the fund?

A. That's right.

Q. And that this manner of handling them was not carried out until after the suggestion and approval of the advisor had been obtained?

A. That would be right.

Mr. Steel: Not the suggestion of the advisor, but the—

Mr. Marvel: Suggestion of the Wilmington Trust Company and the consent and authorization of the advisor had been obtained.

(71) By Mr. Marvel:

Q. During this time, 1936 to 1939, when you were in charge of this particular fund 2152, did you have anything to do with tax matters?

A. I did not personally.

Q. Do you know whether the Wilmington Trust Company did?

A. I believe that as Mr. Bissell stated the only connection we had with tax matters was to file a fiduciary return. I am not sure whether we gave tax information letters at that time to the recipient of the income, but that would be the only connection we would have with any tax matters.

Q. I mean no preparation of the beneficiary's income tax return.

A. No.

Q. Either State or Federal?

A. That's right.

(72) CROSS-EXAMINATION

(73) By Mr. Walls:

(74) Q. In connection with your changes in investments, I believe you said that there were times when you communicated with the advisor by telephone?

A. That's right, and I suppose that would be advance notice that written instructions were on the way. We might get a confirmation and not know what account it applied to—the mail might be held up on the written instructions. Or vice versa, if they had told us they were buying something and (75) a confirmation didn't come through, we would call them and ask them about it to be sure that they had actually placed the order, and that kind of thing.

Q. They would select the broker through whom the sale or purchase would be executed?

A. That's right.

Q. Did you make any changes by consent of them; a change initiated by the trust company?

A. To the best of my knowledge and belief we did not.

REDIRECT-EXAMINATION

By Mr. Marvel:

Q. Mr. Fairman, you said from time to time—or you didn't say it in this way, but this is the impression I got—from time to time the Wilmington Trust Company made certain suggestions to the advisor with respect to—one instance was, I think, the manner in which the proxies should be handled. Were there any suggestions during that period from 1936 to 1939 that you know of which were made by the Wilmington Trust Company which related to anything more than the procedural mechanics of expediting the administration of this trust?

(76) A. I would say the answer to that would be no.

(77) **EXCERPTS FROM DEPOSITION OF THE
WITNESS BRADFORD TAKEN BY THE
MARVEL DEFENDANTS.**

(December 28, 1954.)

WILLIAM BRADFORD, JR., called as a witness by the Marvel defendants, being first duly sworn by the Notary Public, testified as follows:

DIRECT-EXAMINATION

By Mr. Marvel:

Q. Mr. Bradford, will you state your name and address for the record?

A. William Bradford, Jr., 239 Philadelphia Pike, Wilmington.

Q. And your present employer?

A. Wilmington Trust Company.

Q. When did you first become employed by the Wilmington Trust Company?

A. In June, 1932.

Q. You have been here since 1932?

A. With the exception of military leave.

Q. And that was when?

A. 1943. The end of 1943 to the first part of 1946.

Q. In March, 1935, what was your position in the Wilmington Trust Company?

A. I was then the clerk in the securities cage.

* * *

(78) Q. In that capacity did you become familiar with the administration of a fund established by Dora Browning Donner in the Wilmington Trust Company under an agreement dated March 25, 1935, which has heretofore been referred to as 2152?

A. Yes, sir.

Q. When did you become familiar with that administration?

A. Well, I was in the securities work at the time the trust was created.

Q. So that from its very inception, March 25, 1935, you handled that account?

A. I handled the purchases and sales and exchanges in that account, yes, sir.

Q. Could you describe briefly the manner in which you handled the purchases and sales in that fund?

A. Letters from the advisor of the trust were delivered to me stating that certain securities had been bought or sold, the price, the broker, and I followed the instructions of making payment or delivering the securities against payment.

Q. And that was done by written instructions by the (79) advisor of the fund?

A. Yes, sir.

Q. Do you know who was the advisor of the fund at that time?

A. Mr. Donner.

Q. William H. Donner?

A. William H. Donner, yes, sir.

Q. And you handled those mechanical details from March 25, 1935, until what period.

A. About the middle of June in 1936.

Q. Was that when Mr. Fairman took over?

A. Yes.

Q. You instructed him as to how to handle it?

A. Well, sir, my duties were perhaps more restricted than Mr. Fairman's in that I handled only the securities work, so to that extent I showed Mr. Fairman the type of letter that we received and what we did concerning, as he mentioned—wait for the confir-

mation and check the confirmation and the letter of instructions, and so on. And then he turned over the work to me and I continued to execute the orders that he had authenticated.

Q. During this period of March, 1935, until you say June, 1936—

(80) A. June, 1936, yes, sir.

Q. Whenever it was that Mr. Fairman took over, did you on behalf of the Wilmington Trust Company ever exercise any independent judgment either as to a sale, purchase or exchange of property in this fund, or the manner, or the broker or agent through whom such sales or purchases or exchanges were effected?

A. No, sir.

Q. During this period of 1935 and 1936 did you handle the matter of the voting of the proxies?

A. No, sir.

Q. Do you know who did that?

A. No, sir.

Q. Do you know whether there were any common stocks in the fund at that time?

A. To the best of my knowledge there were.

Q. There were?

A. There were.

Q. So someone must have handled the proxies which those shares were entitled to vote?

A. Yes.

Q. You don't know who did that?

A. No, sir. That was not a part of my duties, any part of the proxy work.

(81) Q. Well, then, your duties were limited solely to carrying out the mechanical details to effect the instructions received from the advisor of the fund?

A. Yes, sir, and during that particular period that you are referring to, to authenticate authorizations we received.

Q. And you never acted without an authorization?

A. No, sir.

Q. You never acted until the authorization had been authenticated?

A. That's right. That is, the signature authenticated.

Q. That is right, and the signature was that of William H. Donner?

A. Yes, sir.

Q. You knew that, you knew his signature?

A. Yes, sir.

Q. Is it a fact that the only administrative detail you carried out with respect to this fund during this period of 1935 and 1936 was with respect to the investment?

A. To effecting changes in investments.

Q. To effecting changes in investments as directed by the advisor?

A. That's correct.

Q. You had nothing to do with the proxies?

(82) A. No, sir.

Q. You had nothing to do with the disbursement of the income?

A. No, sir.

Q. And you had nothing to do with any tax returns?

A. No, sir.

Q. Do you know who had anything to do with those matters other than the ones you had knowledge of?

A. Well, we had a tax division of the trust department that did what tax work was necessary or that we were obliged to do in connection with—

Q. Who was in charge of that at the time? Do you recall?

A. No, sir. Not specifically.

Q. Do you know who handled the proxies at that time, 1935 and 1936?

A. To the best of my knowledge the proxies were handled in what we call the investment division of the trust department.

Q. And who was the person in charge of that at the time?

A. At that time Mr. Bancroft was in charge.

Q. Mr. J. Sellers Bancroft?

A. Mr. J. Sellers Bancroft.

Q. But you don't recall who did the tax work?

A. We had some changes about that time, sir, and I can't (83) locate it in time as to just what happened when.

Q. You mean you just don't know now?

A. Yes, sir.

(84) **EXCERPTS FROM DEPOSITION OF THE
WITNESS BANCROFT TAKEN BY THE MAR-
VEL DEFENDANTS.**

(December 28, 1954.)

* * *

J. SELLERS BANCROFT, called as a witness by the Marvel defendants, being first duly sworn by the Notary Public, testified as follows:

DIRECT-EXAMINATION

By Mr. Marvel:

Q. Mr. Bancroft, will you state for the record your name and address?

A. J. Sellers Bancroft, 2409 Willard Street, Wilmington, Delaware.

Q. And the name of your present employer?

A. Wilmington Trust Company.

Q. How long have you been employed by the Wilmington Trust Company?

(85) A. Since September 15, 1927.

Q. In 1935 what was your position in the Wilmington Trust Company?

A. I think I was head of the investment division.

Q. Of the trust department?

A. Of the trust department.

Q. As such head of the investment division did you have occasion to become familiar with an agreement between Dora Browning Donner and the Wilmington Trust Company dated March 25, 1935?

A. Well, I had some knowledge, I would say, of all of the agreements from which trusts were set up and were operated by the Wilmington Trust Company as trustee.

Q. By "all agreements" you are not limiting yourself to the Donner family?

A. No.

Q. Then you did have some knowledge of this particular trust, which was number 2152?

A. I would presume that I had some knowledge.

Q. Would it be helpful to you to have before you a copy of this trust to refresh your knowledge of it?

A. Well, as to my present knowledge, or what I remember, not what I knew in nineteen—whatever the date was—

(86) Q. Well, we won't get very legal at this point, Mr. Bancroft. I want to know what you knew in 1935.

A. I wouldn't know.

Q. Do you have any recollection as to the manner in which proxies of shares which were in the fund set up under the agreement of March 25, 1935, were voted?

A. My recollection on that is that what proxies were voted, were voted on instructions from the Donners. I don't think that we would at that time or any other time have voted the proxies without such instructions.

Q. And whether the instructions were for you to forward the proxies in blank to The Donner Company or whether they were to be voted directly at the meeting, you don't recall?

A. I do not recall that.

Q. But you are clear that nothing was done with respect to the voting of the proxies without an instruction from the advisor of the fund?

A. I am quite sure that that was the case.

Q. Do you know whether in 1935 and 1936 the Wilmington Trust Company undertook the duty of making any tax returns other than the required fiduciary return on this trust 2152?

A. I wouldn't know.

Q. In your position at that time you had nothing to do (87) with the matter of taxes and tax returns?

A. No, a bare minimum.

Q. You are familiar with the manner in which the sales, purchases and exchanges of securities in this fund 2152 were handled at that time, 1935 and 1936?

A. Well, I am familiar to this extent, that the Donner trusts were handled on directions from either the Donners or their advisors. We did not do anything, as I recall, without being directed to do so.

* * *

CROSS-EXAMINATION

* * *

(88) Mr. Anderson: No questions.

By Mr. Walls:

Q. Mr. Bancroft, the agreement I believe mentions that investment changes will be made on the direction of the advisors or with the consent of the advisors, and as I understand your testimony no changes were made except on the direction of the advisors?

A. All I know on that is that those Donner trusts—I am not differentiating this one from the others—have pretty unanimously been run on a direction basis. I won't say 100%, but I will say for the most part all have.

Q. And over what period is this?

(89) A. Since we have had the trusts.

Q. You didn't undertake to initiate investment changes?

A. My guess on that would be, and this is simply a guess, that early in the game we found that they were not interested in our ideas, that they had their

own. For example, I know that when Mr. Donner was down here one time he mentioned that this was a problem to him because always in the past he had invested in companies which he controlled. But he didn't seem to want much help from us, so that permeated all the trusts, and whether or not we started making suggestions, I don't know. But we soon found out that they wanted to direct us, and so we went along with them that way.

Q. So that the changes that were made, were made on the directions of the advisor?

A. Certainly by far the largest part. I think there have been relatively few consent changes.

By Mr. Marvel:

Q. Well, Mr. Bancroft, you don't know of any consent changes with respect to this particular fund 2152?

A. I don't know whether there were or whether there weren't. I would doubt if there were many. There might have been none. I don't know.

(90) Q. But you were very careful not to do anything without the written instruction of the authorized person?

A. That's correct.

* * *

AFFIDAVIT OF C. KENNETH BAXTER.

(Dated December 27, 1954.)

* * *

1. That since January 1, 1950, and at the present time, he is President of The Donner Corporation. That prior thereto, and since 1931, he has been an investment adviser to William H. Donner, husband of Dora Browning Donner, and members of his family and companies owned or controlled by them. He has been an officer since 1940 of Donner Estates, Inc., (since 1947, Donner Corporation).

2. As such investment adviser, he is familiar with the management and the conduct of the financial and business affairs of the family of William H. Donner. He is familiar with the agreement made between Dora Browning Donner and the Wilmington Trust Company, Wilmington, Delaware, on March 25, 1935. Under said agreement, Wilmington Trust Company, as Trustee, is specifically authorized and empowered, among other things:

(1) To sell at public or private sale, exchange for like or unlike property, convey, lease for terms longer or shorter than the trust, and otherwise dispose of any or all property, real or personal, held in the trust fund, for such price and upon such terms and credits as Trustee may deem proper.

(2) To invest the proceeds of any such sale or sales, and any other money available for investment, in such stocks, bonds, notes, securities and/or other income-producing property as may be deemed appropriate for this trust fund, irrespective of the rules of investment applying to trustees under any present or future laws of the State of Delaware or elsewhere.

(3) To participate in any plan or proceeding for protecting or enforcing any right, obligation or interest arising from any stock, bond, note or security held in the trust fund, or for reorganizing, consolidating, merging or adjusting the finances of any corporation issuing the same, to accept in lieu thereof any new or substituted stocks, bonds, notes and/or securities, to pay any assessment or any expense incident thereto, and to do any other act or thing that Trustee may deem necessary or advisable in connection therewith.

Article 4 of the agreement, however, provides that the Trustee shall exercise the above recited powers only upon written direction of, or with the written consent of, the adviser of the trust; provided, however, that if at any time during the continuance of the trust, there shall be no adviser, or if the adviser shall fail to give any written direction or to communicate in writing to Trustee his consent or disapproval as to the exercise of any of the aforementioned powers within ten (10) days after Trustee shall have sent to the adviser, by registered mail, a written request for such consent, Trustee is authorized and empowered to take such action as it, in its sole discretion, shall deem to be for the best interest of the beneficiary of the Trust. W. H. Donner was the adviser originally named in said agreement. By letter dated June 29, 1936, Dora Browning Donner nominated and appointed affiant, C. Kenneth Baxter, and J. E. Hairsine, or either of them, to act as adviser in lieu of W. H. Donner, the adviser originally named in the agreement, and by letter dated October 14, 1937, Dora Browning Donner nominated and appointed Affiant, C. Kenneth Baxter, J. E. Hairsine and John Stewart, or any one of them, as such advisers. By letter dated December 13, 1940, Dora Browning Donner amended paragraph 5 of the

agreement which originally provided that the adviser of the so-called trust should be W. H. Donner or such other "person or persons" as Dora Browning Donner should nominate in writing delivered to Wilmington Trust Company, so as to provide that the adviser should be Donner Estates, Inc., a Pennsylvania corporation, or such other "corporation, person or persons" as Dora Browning Donner might nominate in writing delivered to Wilmington Trust Company, and to specify the compensation to be paid to "Donner Estates, Inc.," for acting as adviser. By letter dated February 5, 1946, Dora Browning Donner further amended paragraph 5 by changing the compensation to be paid to "Donner Estates, Inc., or any other adviser or advisers hereinafter nominated." Since June 29, 1936, he, C. Kenneth Baxter, in his capacity as an individual adviser or as an officer of Donner Estates, Inc. (since 1947, Donner Corporation), has acted as an adviser of the fund deposited with the Wilmington Trust Company under the agreement of March 25, 1935.

3. With respect to the manner of the management of the fund held by the Wilmington Trust Company pursuant to the agreement with Dora Browning Donner dated March 25, 1935, Wilmington Trust Company, to the best of his knowledge, since June 29, 1936, has neither bought nor sold any securities for the said fund, except upon directions of the adviser of the fund. Whenever the adviser determined to sell or exchange property held in the fund, or to reinvest proceeds of any such sale or to invest the assets of the fund in other securities, the adviser would place orders for such sale, exchange, or purchase, and then advise and direct Wilmington Trust Company that such order had been placed, the name of the broker or agent with whom such order had been placed, and the

manner in which the Wilmington Trust Company should effect delivery of the property involved or should forward the purchase price for such transaction. Attached hereto and marked Exhibit A is a set of forms which have been most recently used by the adviser to give Wilmington Trust Company directions with respect to each sale, exchange or purchase of securities for and on behalf of said fund.

4. In connection with the management and investment of said fund, numerous sales, purchases, and exchanges of property were executed as hereinabove outlined, and in no case, to the best of his knowledge, did the Wilmington Trust Company ever exercise its independent judgment either as to a sale, purchase, or exchange of property made or as to the manner or the broker or agent through whom such sales, purchases and exchanges were effected. Wilmington Trust Company, in all such instances, merely carried out the mechanical details and procedures as instructed by the adviser, in order to accomplish the sales, purchases, and exchanges determined upon by the adviser and with respect to which Wilmington Trust Company was given directions by the adviser.

5. The adviser of said fund had full responsibility for any decrease or increase in the value of said fund, attributable to the investments of the fund, and Wilmington Trust Company accepted no responsibility for any such decrease or increase in the value thereof.

6. The adviser either instructed the Wilmington Trust Company whether and how to vote, and whether directly or by proxy, at any and all elections or stockholders' meetings of companies whose shares of stock were held in said fund, and the manner, the persons and the proposals for or against such votes were to be

cast, or instructed the Wilmington Trust Company to deliver its proxy to the adviser for the shares of stock held in said fund in order for the adviser to vote such shares at any and all elections or stockholders' meetings of companies whose shares of stock were held in said fund. In no case, to the best of his knowledge, did Wilmington Trust Company exercise its independent judgment as to the manner, the persons or the proposals for or against which votes of shares of stock held in said fund were cast.

7. The adviser of said fund has, upon occasion, instructed the Wilmington Trust Company as to whether expenses and other disbursements should be charged against principal or income, or partly against principal and partly against income.

8. The adviser of said fund instructed the Wilmington Trust Company as to the manner to take and to hold any security or other property constituting a part of the fund, whether in bearer form or in the name of the Wilmington Trust Company or in the name of a nominee of Wilmington Trust Company. In no case, to the best of his knowledge, did Wilmington Trust Company exercise its independent judgment as to such determination but in all cases merely carried out the instructions of the adviser.

9. Dora Browning Donner, in order to accomplish the administration of said fund, appointed all advisers to said fund without whose instructions, to the best of his knowledge, Wilmington Trust Company in no case acted with respect to making investments or selling securities.

10. The Donner Corporation, by agreement with various beneficiaries, including Dora Browning Donner, is obligated to prepare personal tax returns, both

Federal and State, and in all cases where such services are requested, does prepare and, after signature by the beneficiaries, does file and, where necessary, defend such returns. This does not include fiduciary returns which, in all cases, are prepared by the tax departments of the various banks serving as Trustee. In January, 1944, Dora Browning Donner became a citizen and resident of Florida, and it became necessary to file for and on her behalf tax returns required by that state. From 1944 until the time of her death in 1952, Dora Browning Donner paid the intangible tax assessed in Palm Beach County, Florida, upon all of the intangibles constituting, from time to time, the assets held in custody by Wilmington Trust Company under the agreement of March 25, 1935. Wilmington Trust Company prepared no tax returns for Dora Browning Donner required to be filed in the State of Florida.

C. Kenneth Baxter

AFFIDAVIT OF JOHN STEWART.

(Dated December 14, 1954.)

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1. That he is a resident of Rosemont, Pennsylvania. From November 1, 1940, until December 31, 1949, he was familiar with and active in the management and the conduct of the financial and business affairs of the family of William H. Donner, including the manner in which investments were made and handled. Particularly, he is familiar with the agreement made between Dora Browning Donner and the Wilmington Trust Company, Wilmington, Delaware, on March 25, 1935. He acted, together with others, as financial adviser to Dora Browning Donner pursuant to the terms of said agreement between Dora Browning Donner and Wilmington Trust Company dated March 25, 1935. He was president of Donner Estates, Inc., (since 1947, Donner Corporation) from 1940 until December 31, 1949. He married Dorothy B. Rodgers, the daughter of Dora Browning Donner.

2. In his capacity as one of the financial advisers of Dora Browning Donner, he has knowledge of the manner in which investments were made on her behalf and the manner in which the custody of her securities was performed. Under the terms of the agreement between Dora Browning Donner and Wilmington Trust Company dated March 25, 1935, and, in fact, Wilmington Trust Company acted solely as the custodian of securities deposited with it for and on behalf of the account of Dora Browning Donner, and in no way exercised independent judgment as to the management or supervision of said securities. After depositing the securities with Wilmington Trust Company at the time Dora Browning Donner entered into said agreement

with Wilmington Trust Company dated March 25, 1935, which securities are listed on Schedule A to said agreement, it became necessary to establish procedures as to the management and investment of the fund so created. The procedures thereupon established provided, in accordance with the terms of said agreement, that Wilmington Trust Company would perform no acts with respect to said fund or securities except upon the written directions of the adviser of the fund. Whenever the adviser determined to sell or exchange property held in the fund, the adviser would make such sale or exchange and then advise and direct Wilmington Trust Company that such sale or exchange had been made, the name of the broker or agent through whom such sale or exchange had been executed, and the manner in which the Wilmington Trust Company should effect delivery of the property so sold or exchanged. Whenever the adviser determined to reinvest the proceeds of any such sale or to invest the assets of the fund in other securities, the adviser would make a purchase and then advise and direct Wilmington Trust Company that such purchase had been made, the name of the broker or agent through whom such purchase had been executed, and the manner in which Wilmington Trust Company should forward the purchase price of such transaction.

3. In connection with the management and investment of said fund, numerous sales, purchases, and exchanges of property were executed as hereinabove outlined and in no case did the Wilmington Trust Company ever exercise its independent judgment either as to a sale, purchase, or exchange of property made or as to the manner or the broker or agent through whom such sales, purchases, and exchanges were effected. Wilmington Trust Company in all in-

stances merely carried out the mechanical details and procedures as instructed by the adviser, in order to accomplish the sales, purchases, and exchanges determined upon by the adviser and with respect to which Wilmington Trust Company was given directions by the adviser.

4. The adviser of said fund had full responsibility for any decrease or increase in the value of said fund, and Wilmington Trust Company accepted no responsibility for any such decrease or increase in the value thereof.

5. The adviser instructed the Wilmington Trust Company whether and how to vote, and whether directly or by proxy, at any and all elections or stockholders' meetings of companies whose shares of stock were held in said fund, and the manner, the persons and the proposals for or against such votes were to be cast, or instructed the Wilmington Trust Company to deliver its proxy to the adviser for the shares of stock held in said fund in order for the adviser to vote such shares at any and all elections or stockholders' meetings of companies whose shares of stock were held in said fund. In no case did Wilmington Trust Company exercise its independent judgment as to the manner, the persons or the proposals for or against which votes of shares of stock held in said fund were cast.

6. The adviser of said fund instructed the Wilmington Trust Company as to whether expenses and other disbursements should be charged against principal or income, or partly against principal and partly against income. In no case did Wilmington Trust Company exercise its independent judgment as to such determination but in all cases merely carried out the instructions of the adviser.

7. The adviser of said fund instructed the Wilmington Trust Company as to the manner to take and to hold any security or other property constituting a part of the fund, whether in bearer form or in the name of the Wilmington Trust Company or in the name of a nominee or nominees of Wilmington Trust Company. In no case did Wilmington Trust Company exercise its independent judgment as to such determination, but in all cases merely carried out the instructions of the adviser.

8. Dora Browning Donner, in order to accomplish the administration of said fund, appointed all advisers to said fund without whose instructions Wilmington Trust Company in no case acted.

9. Affiant denies that at the time of the alleged exercise of an alleged power of appointment by Dora Browning Donner on or about December 3, 1949, that the issue of Katharine N. R. Denckla and Dorothy B. R. Stewart and affiant had substantial incomes from various trusts.

10. At the time of the alleged exercise of an alleged power of appointment dated December 3, 1949, under the agreement of March 25, 1935, and at all times thereafter, Elizabeth Donner Hanson had control over, and an interest in, property substantially greater in value than that of Katharine N. R. Denckla or Dorothy B. R. Stewart.

/s/ John Stewart

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AFFIDAVIT OF JOHN E. HAIRSINE.

(Dated January 6, 1955.)

1. That he is presently employed by The General Coal Company with offices at Fidelity Philadelphia Bldg., 123 South Broad Street, Philadelphia, Pennsylvania.

2. He was employed by William H. Donner on January 1, 1934, for and on behalf of various companies owned or controlled by the family of William H. Donner. He was employed as an adviser on tax, accounting and investment matters. In such capacity he became familiar with the management and conduct of the financial and business affairs of the family of William H. Donner and in particular those of his wife, Dora Browning Donner. Donner Estates, Inc., was incorporated on September 11, 1940, and he served as Vice President thereof from said date until October 31, 1940.

3. He was familiar with an agreement made between Dora Browning Donner and the Wilmington Trust Company dated March 25, 1935. He was the sole witness of its execution by Dora Browning Donner.

4. From March 25, 1935, until October 31, 1940, he was familiar with and active in the management of the fund held by Wilmington Trust Company for Dora Browning Donner under the agreement of March 25, 1935. During this period Wilmington Trust Company neither bought, sold nor exchanged any securities for the said fund except upon direction of the advisor of the fund, who had full and complete control of the management of the fund.

5. With respect to the manner of the management of the fund held by the Wilmington Trust Company pursuant to the agreement with Dora Browning Donner dated March 25, 1935, Wilmington Trust Company, to the best of his knowledge, since March 25, 1935, has neither bought nor sold any securities for the said fund, except upon directions of the adviser of the fund. Whenever the advisor determined to sell or exchange property held in the fund, or to reinvest proceeds of any such sale or to invest the assets of the fund in other securities, the adviser would place orders for such sale, exchange, or purchase, and then advise and direct Wilmington Trust Company that such order had been placed, the name of the broker or agent with whom such order had been placed, and the manner in which the Wilmington Trust Company should forward the purchase price for such transaction.

6. In connection with the management and investment of said fund, numerous sales, purchases, and exchanges of property were executed as hereinabove outlined, and in no case, to the best of his knowledge, did the Wilmington Trust Company ever exercise its independent judgment either as to a sale, purchase, or exchange of property made or as to the manner or the broker or agent through whom such sales, purchases, and exchanges were effected. Wilmington Trust Company, in all such instances, merely carried out the mechanical details and procedures as instructed by the adviser, in order to accomplish the sales, purchases, and exchanges determined upon by the adviser and with respect to which Wilmington Trust Company was given directions by the adviser.

7. The adviser of said fund had full responsibility for any decrease or increase in the value of said

fund, attributable to the investments of the fund, and Wilmington Trust Company accepted no responsibility for any such decrease or increase in the value thereof.

8. The adviser either instructed the Wilmington Trust Company whether and how to vote, and whether directly or by proxy, at any and all elections or stockholders' meetings of companies whose shares of stock were held in said fund, and the manner, the persons and the proposals for or against such votes were to be cast, or instructed the Wilmington Trust Company to deliver its proxy to the adviser for the shares of stock held in said fund in order for the adviser to vote such shares at any and all elections or stockholders' meetings of companies whose shares of stock were held in said fund. In no case, to the best of his knowledge, did Wilmington Trust Company exercise its independent judgment as to the manner, the persons or the proposals for or against which votes of shares of stock held in said fund were cast.

9. The adviser of said fund instructed the Wilmington Trust Company as to the manner to take and to hold any security or other property constituting a part of the fund, whether in bearer form or in the name of the Wilmington Trust Company. In no case, to the best of his knowledge, did Wilmington Trust Company exercise its independent judgment as to such determination but in all cases merely carried out the instructions of the adviser.

1. Dora Browning Donner, in order to accomplish the administration of said fund, appointed all advisors to said fund without whose instructions, to the best of his knowledge, Wilmington Trust Company in no case acted with respect to making investments or selling securities.

John E. Hairsine

AFFIDAVIT OF C. ROBERT BURNS.**(Dated December 17, 1954.)**

1. That he is an attorney at law authorized to practice in the State of Florida. That he is one of the attorneys for ELWYN L. MIDDLETON, guardian of the property of Dorothy B. R. Stewart, a mentally ill person. That as such attorney he has examined the records in the County Judge's Court in and for Palm Beach County, Florida, as they relate to Elizabeth Donner Hansen, Executrix under the Last Will of Dora Browning Donner, deceased.

2. On June 26, 1953, Elizabeth Donner Hanson as Executrix under the Last Will of Dora Browning Donner, deceased, filed her inventory and appraisement in the County Judge's Court in and for Palm Beach County, Florida. Said inventory and appraisement set forth as under the possession and control of said Executrix all of the assets of the decedent, Dora Browning Donner, and included all of the assets theretofore held by Wilmington Trust Company, Wilmington, Delaware, under an agreement between said Wilmington Trust Company and Dora Browning Donner dated March 25, 1935. Thereafter in December, 1953, said Executrix and her attorneys obtained an order of the County Judge's Court authorizing payment to them of fees on the total estate, including all assets held by the Wilmington Trust Company under said agreement of March 25, 1935, and including \$417,000.00 paid out by the said Wilmington Trust Company in January, February, and March, 1954.

3. On January 22, 1954, ELWYN L. MIDDLETON as guardian of the property of Dorothy B. R. Stewart, and KATHERINE N. R. DENCKLA com-

menced an action in the Court of the Fifteenth Judicial Circuit in and for Palm Beach County, Florida, against Elizabeth Donner Hanson individually and as Executrix of the Will of Dora Browning Donner, deceased, et al., the same being No. 31,980. On February 18, 1954, the answering defendants, including Elizabeth Donner Hanson individually and as Executrix as aforesaid, filed a motion to dismiss said complaint on the ground that there was no res in the State of Florida.

4. As said Executrix and her attorneys had treated said \$417,000.00 worth of assets as being part of the estate of said deceased in Palm Beach County, and had paid themselves fees on the same, the plaintiffs in the action hereinabove mentioned filed a petition in the County Judge's Court of Palm Beach County, Florida, to compel the said Elizabeth Donner Hanson, as Executrix, to produce the assets of said estate as authorized by the Florida statutes. Thereupon, on February 26, 1954, the said Executrix and her attorneys filed a motion in said County Judge's Court offering to return approximately \$7,600.00 in Executrix' fees and \$5,700.00 in attorneys' fees which they had collected on the said \$417,000.00 under order obtained from the county judge on December 23, 1953, which treated said assets as part of the assets in the State of Florida. The county judge, on April 9, 1954, stayed further hearing on such matters until the outcome of said case in the Circuit Court.

/s/ C. Robert Burns
C. Robert Burns

* * *

EXCERPTS FROM AFFIDAVIT OF ELWYN L. MIDDLETON.**(Dated September 3, 1954.)**

That on January 22, 1954, he, as such guardian, and the aforesaid Katherine N. R. Denckla, each as plaintiff, filed in the Circuit Court of the Fifteenth Judicial Circuit of Florida, in and for Palm Beach County, Florida, their chancery suit #31,980, referred to in paragraph 5 of the foregoing motion, a true copy of the complaint in such suit (without exhibits) being attached to this affidavit and made a part hereof.

Such proceedings have been had in such suit that decrees pro confesso have heretofore been entered, after due and proper service of process, upon all defendants therein named (including Delaware Trust Company and Wilmington Trust Company, each as trustee) except as against the defendant Elizabeth Donner Hanson, individually and as executrix of the last will and testament of Dora Browning Donner, deceased, and except as against her children, William Donner Roosevelt, Joseph Donner Winsor and Donner Hanson; each of such defendants against whom no decree pro confesso have been entered have filed answers in such cause;

OPINION.

(Filed December 29, 1955. (119 A. 2d 901).)

HERRMAN, Acting Vice Chancellor.

The Court is called upon to decide (1) whether the doctrine of collateral estoppel precludes the parties from litigating in this action the issue of the validity of a certain written agreement as an *inter vivos* trust agreement; and, if not, (2) whether the trust and the exercises of the power of appointment thereunder are valid or invalid.

This action for declaratory judgment was brought by Elizabeth Donner Hanson, Executrix and Trustee under the Will of Dora Browning Donner, to determine the persons entitled to assets valued at \$417,000. The assets were held at the time of the death of Mrs. Donner by the defendant Wilmington Trust Company under an Agreement entered into by them in 1935. After Mrs. Donner's death, the assets were distributed by Wilmington Trust Company to certain recipients named in Instruments executed by Mrs. Donner in 1949 and 1950 in the exercise of the power of appointment reserved to her under the Agreement of 1935.

The case is before the Court upon four motions for summary judgment. Three of the motions are based upon the contention that the Agreement of 1935 created a valid trust, that the power of appointment thereunder was validly exercised in 1949 and 1950, and that the distributions by Wilmington Trust Company pursuant thereto were properly made in discharge of its duty as Trustee under the Agreement. This is the position taken in the motions for summary judgment

filed by the plaintiff, by Wilmington Trust Company, Trustee, and Edwin D. Steel, Jr., Guardian Ad Litem for three minor defendants, Joseph Donner Winsor, Curtin Winsor, Jr., and Donner Hanson, grandchildren of Mrs. Donner. Opposed to this position is the cross-motion for summary judgment filed by the defendants Dora Stewart Lewis, Mary Washington Stewart Borie and Paula Browning Denckla, other grandchildren of Mrs. Donner. These defendants contend that by application of the doctrine of *res judicata* or collateral estoppel, or by reason of applicable principles of law, this Court must conclude that the Agreement of 1935 was an agency agreement and not a trust agreement; that, therefore, the Instruments of 1949 and 1950 were invalid testamentary acts and the transfer of assets by Wilmington Trust Company thereunder was erroneous because such assets should have been distributed under the Will of Mrs. Donner. These defendants cross-claim and seek a judgment against Wilmington Trust Company in the amount of \$417,000. The defendant Delaware Trust Company, Trustee, supports the motions of the proponents of the Trust. Robert B. Walls, Jr., Guardian Ad Litem for the defendants Dorothy B. R. Stewart and William Donner Denckla, incompetent daughter and minor grandson of Mrs. Donner, supports the motion of the opponents of the Trust. The pending motions are based upon the pleadings and exhibits thereto, affidavits, depositions and certified copies of the Florida proceedings herein-after discussed.

There does not appear to be any genuine issue as to any of the following facts:

1. The plaintiff has been barred from proceeding further herein by an injunction issued to her by the Circuit Court of the Fifteenth Judicial Circuit of Florida, in and for Palm Beach County, pursuant to the decree of that Court hereinafter discussed.

Under the Agreement with Wilmington Trust Company, dated March 25, 1935, Mrs. Donner transferred to it certain designated securities. The Agreement provided that Wilmington Trust Company, as Trustee, should pay the net income of the trust fund to Mrs. Donner for life and, upon her death, should transfer the trust fund, free from the trust, "unto such person or persons * * * as Trustor shall have appointed by the last instrument in writing which she shall have executed and delivered to Trustee."

Thereafter, Mrs. Donner executed and delivered to Wilmington Trust Company an Instrument, dated December 3, 1949, in which, after revoking earlier Instruments by which she purportedly had exercised her power of appointment, she again purported to exercise the power of appointment by directing that, upon her death, the Trustee should transfer the trust fund as follows: (1) \$4,000 to three named individuals; (2) \$1,000 to each of certain servants; (3) \$10,000 to Louisville Trust Company in trust for Benedict H. Hanson, a son-in-law of Mrs. Donner; (4) \$10,000 to the Bryn Mawr Hospital; (5) \$200,000 to the Delaware Trust Company in trust for Joseph Donner Winsor; (6) \$200,000 to the Delaware Trust Company in trust for Donner Hanson; and (7) the residue to the Executrix under Mrs. Donner's Will to be dealt with as stated therein. Mrs. Donner thereafter executed and delivered to Wilmington Trust Company an Instrument, dated July 7, 1950, which purported to partially revoke the Instrument of December 3, 1949 by deleting therefrom the provision for \$10,000 to the Louisville Trust Company, Trustee. In all other respects, the Instrument of 1950 confirmed the Instrument of 1949.

At the time of the execution of the Agreement of 1935, Mrs. Donner was a resident of Pennsylvania. The securities referred to in the Agreement were delivered

to Wilmington Trust Company in Delaware and they remained in Delaware in the possession of and under the administration of the Trust Company. Wilmington Trust Company has no place of business and transacts no business outside of Delaware.

When Mrs. Donner died in 1952, she was a resident of Palm Beach County, Florida, and had been such since 1944. The Will of Mrs. Donner, dated December 3, 1949, was probated there and the plaintiff herein, Elizabeth Donner Hanson, duly qualified as Executrix under the Will. After bequeathing her personal and household effects to Mrs. Hanson and Dora Donner Ide, two of her daughters, Mrs. Donner made the following disposition of the residue of her property, "including any and all property, rights and interests over which I may have power of appointment which prior to my death as not been effectively exercised by me or has been exercised by me in favor of my Executrix": (1) Payments of all death taxes on property appointed by Mrs. Donner under the 1935 Agreement; and (2) the balance to be divided into two equal parts: (a) one part to Delaware Trust Company in trust for Katherine N. R. Denckla, another daughter; and (b) the other part to Mrs. Hanson in trust for Dorothy B. Rodgers Stewart, another daughter, during her lifetime and after her death to Delaware Trust Company in trust for Mrs. Denckla.

When Mrs. Donner died, the securities and cash held by Wilmington Trust Company under the 1935 Agreement amounted to \$1,493,629.91. Thereafter, Wilmington Trust Company distributed cash and securities aggregating \$417,000 in accordance with the provisions of the Instruments of 1949 and 1950 and deposited the balance to the account of Mrs. Hanson as Executrix and Trustee under the Will of Mrs. Donner. None of the trust funds distributed to Dela-

ware Trust Company, Trustee, have ever been held or administered outside of Delaware.

In January 1954, Mrs. Denckla and Elwin L. Middleton, guardian of the property of Mrs. Stewart, brought an action in the Circuit Court of Palm Beach County, Florida, against Mrs. Hanson, individually and as Executrix of Mrs. Donner's Will, Wilmington Trust Company, Delaware Trust Company and others who were interested in the assets, directly or beneficially, by reason of appointment or the residuary clause of the Will. The Florida action sought a declaratory judgment determining what passed under the Will and the authority of the Executrix over the assets held by Wilmington Trust Company under the 1935 Agreement. Neither Wilmington Trust Company, Delaware Trust Company nor any of the other appointees under the Instrument of 1949, named defendants in the action, were served personally and they did not appear in the action. None of the assets held by Wilmington Trust Company under the Agreement of 1935 have ever been held or administered in Florida. On January 14, 1955, a "summary final decree" was entered by the Florida Court holding (1) that the Court lacked jurisdiction over the assets in Delaware and over Wilmington Trust Company, Delaware Trust Company, and the other nonanswering defendants and that the complaint be dismissed without prejudice as to all such defendants; and (2) that no present interest passed to any beneficiary other than Mrs. Donner under the Agreement of 1935 and the Instrument of 1949 and that the Instrument was testamentary in character and invalid as a testamentary disposition because it was not subscribed by two witnesses as required by Florida law; and (3) that, therefore, as to the parties before the Florida Court, the assets held by Wilming-

ton Trust Company under the Agreement of 1935 passed under the residuary clause of Mrs. Donner's Will.

In the meanwhile, in July 1954, the instant action was begun by Mrs. Hanson as Executrix and Trustee under Mrs. Donner's Will. Named herein as defendants are Wilmington Trust Company as Trustee, Delaware Trust Company as Trustee, the appointees named in the Instruments of Appointment executed by Mrs. Donner, residuary legatees under Mrs. Donner's Will and others having beneficial interests. The complaint herein alleges that it was filed because of the desire of the Executrix to settle the matters in controversy finally and conclusively "as to all parties so that she may effectively perform all of her duties, account as Executrix and enter upon her duties as Trustee." The complaint alleges that no part of the assets involved were located in Florida and that Wilmington Trust Company, Delaware Trust Company and certain other indispensable parties were not before the Florida Court; that, therefore, that Court could not render "an effective and binding decree." The prayer of the complaint in this action is that this Court determine by declaratory judgment the persons who, at the time of Mrs. Donner's death, were entitled to participate in the assets held in trust by Wilmington Trust Company under the 1935 Agreement.

F. *Collateral Estoppel*

The first question to be decided is whether by reason of the Florida decree, the parties hereto are precluded from litigating in this action the issue of the validity of the Agreement of 1935 as a trust agreement. This is the ultimate question because the validity of the exercises of the power of appointment de-

pend, in this case, upon the validity of the basic Agreement. See *Wilmington Trust Co. v. Wilmington Trust Co.*, 26 Del. Ch. 397, 24 A.2d 309, 312, 139 A.L.R. 1117.

[1, 2] The opponents of the Trust assert the doctrines of *res judicata* and collateral estoppel. The doctrine of *res judicata* is not applicable because the Florida action and this action involve different causes of action. The refinement of the *res judicata* doctrine known as the doctrine of collateral estoppel may be applicable, however, the difference in causes of action notwithstanding. See *Niles v. Niles*, Del. Ch., 111 A.2d 697; *Petrucci v. Landon*, 9 Terry 491, 107 A.2d 236; Scott, "Collateral Estoppel by Judgment," 56 Harv. L.Rev. 1. The question, then, is whether the doctrine of collateral estoppel may be invoked as an affirmative defense by the opponents of the Trust to preclude the other parties from obtaining a determination by the courts of this State as to the validity of the Trust. I am of the opinion that this question must be answered in the negative.

The Florida Court made determinations incidentally that it would not have had the jurisdiction to make directly. The action before the Florida Court was brought to determine what passed under the residuary clause of the Will of Mrs. Donner, a Florida domiciliary. As necessary but incidental determinations in that action, the Florida Court concluded that the Agreement of 1935 was invalid as a trust agreement and that, therefore, the exercise of the power of appointment in 1949 was testamentary.²

2. The decree of the Florida Court contained no expressed conclusion regarding the invalidity of the Agreement of 1935 as an agreement of trust. Since, however, such determination must have been made before the Court could reach the expressed conclusion that the exercise of the power was testamentary, the prerequisite determination as to the invalidity of the Agreement must be said to be implicit in the decree.

[3] In a direct proceeding, the Florida Court would not have had the jurisdiction to determine the essential validity of an *inter vivos* trust created in Delaware, all of the assets of which were in Delaware and the Trustee of which is a Delaware corporation which was not before the Court. Since neither the Trust *res* nor the Trustee were within the jurisdiction of the Florida Court, it is clear that that Court could not have determined the essential validity of the purported Trust in a direct proceeding brought for the purpose. 54 Am.Jur. "Trusts" §§ 564, 584; Lines v. Lines, 142 Pa. 149, 21 A. 809; compare In re Harri-man's Estate, 124 Misc. 320, 208 N.Y.S. 672; Harvey v. Fiduciary Trust Co., 299 Mass. 457, 13 N.E.2d 299; Land, "Trusts in the Conflict of Laws," Secs. 41, 43.

[4] The principle is settled that where a court has incidentally determined a matter which it would have had no jurisdiction to determine directly, the judgment is not conclusive in a subsequent action brought to determine directly such incidental matter. In his important and widely quoted discussion of "Col-lateral Estoppel by Judgment," 56 Harv.L.Rev. 1, 18, Professor A. W. Scott states:

"* * *. It may happen, however, that the court has jurisdiction to determine the cause of action, but that in determining it the court must necessarily decide a question which it would have no jurisdiction to determine in an action brought expressly for its determination. In such a case the judgment of the court is valid, and the cause of action will be extinguished, the judgment operating by way of merger or bar. The question then arises as to the effect by way of col-lateral estoppel of the determination of the particular

matter on which the judgment was based. Although the authorities are somewhat meager, it seems clear that the judgment should not preclude the parties as to the matter in a subsequent action between them brought expressly to determine the matter in a court which has jurisdiction to determine it. It seems clear, also, that after such determination in a subsequent suit, it is the determination of the court in that suit, and not the incidental determination in the prior suit, which is conclusive between the parties."

See also Restatement of Judgment, § 71; *Petrueci v. Landon*, supra; dissent of Rutledge, J. in *Geracy, Inc., v. Hoover*, 77 U.S. App.D.C. 55, 133 F.2d 25, 147 A.L.R. 185.

In the final analysis, the question becomes one of public policy. At 56 Harv.L.Rev. 1, 22, Professor Scott states:

"The question in all these cases is one of public policy. Should a court which has not been entrusted with jurisdiction to determine a matter directly be permitted to determine it incidentally, not merely for the purpose of deciding the controversy which it can properly decide, but also with the effect of precluding the parties from litigating the question in those courts which alone are entrusted with jurisdiction to determine it directly?"

This eminent authority on the subject concludes with the admonition that the application of the doctrine of collateral estoppel must always be based upon a sound public policy and that care "must be exercised in its application to see that it works no injustice."

[5] It is my opinion that it would be contrary to sound public policy for this Court to consider itself

bound and divested of its duty to determine the essential validity of a Delaware *inter vivos* trust in a direct proceeding brought for the purpose on the ground that a Court in a sister jurisdiction has incidentally determined the matter in another cause of action in which neither the trust *res* nor the Trustee was before the Court. The doctrine of collateral estoppel is a judge-made rule. I do not think that it should be enlarged to the extent of depriving the parties herein of a direct determination by this Court as to the validity of the Trust.

[6] Since the purported Trust was created in Delaware and since the assets have been held by the Trustees in Delaware at all times, the "home" of the Trust is in Delaware and its validity must be determined by the law of Delaware. *Wilmington Trust Co. v. Wilmington Trust Co.*, supra; *Wilmington Trust Co. v. Sloane*, 30 Del.Ch. 103, 54 A.2d 544. This is a case of first impression in this State as to an important phase of the question of the validity of the Trust. The law of this State must be formulated here. It would be contrary to public policy for the Courts of this State to relinquish their duty of enunciating the law controlling a trust having its situs in Delaware and to thereby relegate the Trustee and the Trust *res* here involved to the law prevailing in another jurisdiction. Compare *Taylor v. Crosson*, 11 Del. Ch. 145, 98 A. 375.

[7] Moreover, the application of the doctrine of collateral estoppel might work injustice in this, a case which involves only questions of law. It could mean that the parties who were before the Court in the Florida action would be subjected to one conclusion of law while *Wilmington Trust Company, Delaware Trust Company* and other appointees and beneficiar-

ies, who did not appear in the Florida action, would be controlled by a different rule of law. This could mean that (1) as to the parties before the Florida Court, the disposition of assets would be governed by the residuary clause of the Will, but (2) as to the parties who were not before the Florida Court, the disposition of assets would be governed by the terms of the 1935 Agreement and the exercises of the power of appointment thereunder. This would result in chaos and injustice. The possibility of such result militates against application of the doctrine of collateral estoppel in any case. See Restatement of Judgments, § 70 and com. f, 1948 Supp.; Scott "Collateral Estoppel by Judgment," 56 Harv.L.Rev. 1, 10.

The opponents of the Trust place principal reliance upon *Niles v. Niles*, supra. That case is not applicable because there the issue previously determined incidentally by the New York Court also arose incidentally before the Chancellor. I do not consider anything stated herein to be in conflict with the decision in the *Niles* case. The other cases cited by the opponents of the Trust have been examined and have been found to be inapposite. See *Slater v. Slater*, 372 Pa. 519, 94 A.2d 750; *Ugast v. LaFontaine*, 189 Md. 227, 55 A.2d 705; *United States v. Silliman*, 3 Cir., 167 F.2d 607; *William Whitman Co. v. Universal Oil Products Co.*, D.C.D.Del., 92 F. Supp. 855; *United States v. Stone & Downer Co.*, 274 U.S. 225, 47 S.Ct. 616, 71 L.Ed. 1013.

It is concluded that no determination made in the Florida action is conclusive in this action as to the validity of the Agreement of 1935 as a trust agreement. The parties herein will not be precluded by the defense of collateral estoppel from obtaining the decision of this Court upon that issue.

II. *Essential Validity of the Trust Agreement*

In order to determine the essential validity of the Agreement of 1935 as a trust agreement, it is necessary to consider its pertinent provisions in some detail.

The Agreement was a formal document, executed by Mrs. Donner and Wilmington Trust Company, in which Mrs. Donner was referred to as Trustor and Wilmington Trust Company was referred to as Trustee. It was recited that the Trustor "desires to establish a trust of certain securities and property" referred to as the "trust fund." It was stated that the Trustor thereby "assigned, transferred and delivered" certain listed securities and property to the Trustee in trust to "hold, manage, invest and reinvest the trust fund, collect the income thereof and pay out of such income all taxes, charges and expenses payable thereout." The Agreement provided for the payment of the net income of the trust fund to the Trustor during her lifetime and, upon her death, the Trustee was directed to convey the fund "free from this trust, unto such person or persons and in such manner and amounts and upon such trusts, terms and conditions as Trustor shall have appointed by the last instrument in writing which she shall have executed and delivered to Trustee"; or in the absence of such instrument, "by her Last Will and Testament, or in default of any such appointment then unto the then living issue of Trustor, per stirpes and not per capita." In default of exercise of the power of appointment and living issue, the fund was to go to the Trustor's next of kin. The Agreement then conferred upon the Trustee all of the ordinary general and broad powers usually conferred upon a Trustee, including the power to retain any and all stocks and securities, to sell and exchange the same, to invest the proceeds of any sales, to vote stock, to

participate in reorganizations, to determine whether expenses and other disbursements shall be charged against income or principal, and to hold bearer securities in its own name or in the name of its nominees. It was provided, however, that the Trustee shall exercise its power to sell or exchange trust property, to invest the proceeds of any such sale or other available money and to participate in plans of reorganization, merger, etc., only upon the written direction of, or with the written consent of the Adviser of the trust; provided that if there should be no Adviser, or if the Adviser should fail to act within a ten day period, the Trustee might exercise all such powers and "take such action in the premises as it, in its sole discretion, shall deem to be for the best interest of the beneficiary of this trust." The Trustor named as Adviser her husband or "such other person or persons as Trustor may nominate in writing delivered to Trustee during her lifetime." The Trustor reserved the right to amend or revoke the Trust Agreement in whole or in part and, further, she reserves the right to change the Trustee.

Thus, by the Agreement of 1935, Mrs. Donner reserved to herself the following significant rights and powers: (1) the right to all of the net income for life; (2) the right to amend or revoke the Agreement in whole or in part; (3) the right to change the Trustee; (4) the right to name and change an investment Adviser. The question here presented revolves about those reservations. The opponents of the Trust contend that the cumulation of the reservations created an agency relationship between Mrs. Donner and the Wilmington Trust Company and not a trust relationship; that, therefore, the disposition, insofar as it was intended to take effect after Mrs. Donner's death, was testamentary and invalid for failure to comply with the Florida law relating to the validity of Wills.

[8] It is my opinion that under the law of this State, which governs the essential validity of the Agreement of 1935 as a trust agreement, the reservations of rights and powers made therein by Mrs. Donner did not defeat the *inter vivos* trust she so clearly intended to create by that Instrument.

The law seems settled as to the first three reservations here involved. *Equitable Trust Co. v. Paschall*, 13 Del.Ch. 87, 115 A. 356, stands for the proposition that the reservation of a life interest plus the reservation of the power to revoke an *inter vivos* trust does not invalidate the trust. See also 1 Scott on Trusts, § 57.1; Restatement of Trusts, § 57.; 1 Bogert, Trusts and Trustees, p. 483; *Leahy v. Old Colony Trust Co.*, 326 Mass. 49, 93 N.E.2d 298. Furthermore, the power of the settlor of an *inter vivos* trust to change the trustee has judicial sanction in this State. See *Wilmington Trust Co. v. Wilmington Trust Co.*, supra.

The brunt of the attack on the Agreement of 1935 is centered upon its provisions for the appointment of an investment Adviser and the requirement that the Trustee be governed by the Adviser as to (1) any sale or exchange of trust property; (2) any investment of the proceeds of such sale or of other available money; and (3) any participation in plans of reorganization, merger, etc., of any company in which the Trustee might hold securities. It appears that the effect of such provisions upon the validity of an *inter vivos* trust has not been directly decided in this State.

It seems to be settled that an intended *inter vivos* trust does not become testamentary because the trustor reserves the power to direct the trustee as to the making of investments. See Restatement of Trusts, § 57(2) and comment thereon; 1 Scott on Trusts, § 57.2; 1 Bogert, Trusts and Trustees, § 104; *National Shawmut Bank of Boston v. Joy*, 315 Mass. 457, 53 N.E.2d 113,

125. If the trustor may personally direct or veto investments by the trustee without impairing the validity of an *inter vivos* trust, it would seem to follow that the trustor may assign that authority to a third party, called "adviser," without destroying the validity of the trust. Such investment counselor has been considered to be a fiduciary, a co-trustee or a quasi-trustee. See *Gathright's Trustee v. Gaut*, 276 Ky. 562, 124 S.W.2d 782, 120 A.L.R. 1403, and Annotation 120 A.L.R. 1407; Restatement of Trusts, § 185; Scott on Trusts, § 185; 1 Bogert, Trusts and Trustees, p. 536. In *Equitable Trust Co. v. Union National Bank*, 25 Del. Ch. 281, 18 A.2d 288, this Court found it unnecessary to determine whether or not an investment adviser was a fiduciary. Whatever the precise relationship between the Trustor and the Adviser or the Trustee and the Adviser may be called, I think it is clear that if Mrs. Donner might have reserved to herself the power to specify investments and to direct or veto the Trustee as to investment policy, without impairing the validity of the *inter vivos* Trust, she may properly delegate that power to another without destroying the *inter vivos* Trust she so clearly intended to create.

[9] The intent of the Trustor is a critical and controlling factor in determining whether an agency or a trust was created by the Agreement of 1935. See 1 Scott on Trusts (1954 Supp.) § 57.2, p. 74. It is beyond question, I think, that it was Mrs. Donner's intent that the 1935 Agreement should create an *inter vivos* trust. In the document, she called herself "Trustor," she called Wilmington Trust Company "Trustee" and she referred to the "trust fund" she was thereby conveying to the Trustee.

[10] It appears that there is no established limit to the nature or extent of the powers which the settlor

of a valid *inter vivos* trust may reserve so long as the settlor does not reserve the right to control the trustee as to the details of the administration of the trust. If, however, the settlor reserves such power to control the trustee as to the details of the administration of the trust as to make the trustee a mere agent of the settlor, the disposition may be testamentary so far as it is intended to take effect after the settlor's death. See Restatement of Trusts, § 57(2); 1 Bogert, Trusts and Trustees, § 104, p. 490.

In the Agreement of 1935, Mrs. Donner did not reserve to herself control over the details of the administration of the Trust as would constitute the Trustee an agent under the principal above stated. In the Agreement, she conveyed title and broad powers to the Trustee limited only by the obligation of the Trustee to consult and follow the advice of the investment counselor. The opponents of the Trust contend, however, that an examination of the actual operation of the Trust Fund, as disclosed by affidavits and depositions, reveals that the Trustee permitted the Adviser to usurp all of its powers and functions as to the details of administration and that, in reality, the Trustee was nothing more than a custodian of the securities.

[11-13] Under the circumstances of this case, the *modus operandi* adopted by the Trustee and the Adviser is immaterial to the question of whether the Agreement of 1935 created a relationship of trust or of agency. In the absence of ambiguity, fraud, duress or mistake, the intent of the Trustor and the nature of the relationship created by the Agreement of 1935 is to be determined from the face of the Instrument itself. See Restatement of Trusts, § 38(2), Comment a. There is no showing that Mrs. Donner knew of the facts relied upon by those who assert an agency instead of a trust, nor is there any showing that she was in any way responsible for any surrender of function

which may have taken place as between the Trustee and the Adviser in the operation of the trust. Even if we disregard its vigorous denials and assume that the Trustee abandoned its powers and duties to the Adviser, as asserted by the opponents of the Trust, such situation would not convert a trust agreement into an agency agreement in the absence of the knowledge or consent of Mrs. Donner. A trustor, intending to create an *inter vivos* trust, may not be thwarted by an *ex parte* act or failure to act on the part of the trustee.

It is manifest upon the face of the Agreement that an *inter vivos* trust was intended. Effect will be given to the Agreement in accordance with its plain terms so that the clear intent of the Trustor will not be defeated.

[14] The opponents of the Trust place principal reliance upon Restatement of Trusts, § 56; *In re Pengelly's Estate*, 374 Pa. 358, 97 A.2d 844; *Frederick's Appeal*, 52 Pa. 338, and *In re Hurley's Estate*, 16 Pa. Dist. & Co. 521. In Restatement of Trusts, § 56, it is stated that if no interest passes to the beneficiaries before the death of the settlor, the intended trust is testamentary. That principle is not applicable in the instant case because present interests were created at the time of the execution and delivery of the Agreement of 1935 and the exercises of the power of appointment thereunder. The Agreement provided for an ultimate disposition of the assets to "then living issue of Trustor," subject to defeasance by revocation or exercise of the power of appointment. Present interests were thus created when the Agreement and exercises thereunder were executed, even though such interests could not fall into possession until after the death of Mrs. Donner and even though such interests might be ultimately defeated by further exercise of the power of appointment or by revocation. See 1 Bogert, *Trusts and Trustees*, pp. 481-483; Restatement

of Property, § 157, Comments P, Q and R; Gray on Perpetuities, § 112; Simes, Future Interests, § 80; Leahy v. Old Colony Trust Co., supra. Since present interests passed under the Agreement and the exercises of the power of appointment and only the enjoyment thereof was postponed until the Settlor's death, the *inter vivos* trust here is not defeated by application of the principle stated in § 56 of the Restatement of Trusts. See Brown v. Pennsylvania Co., 2 W.W. Harr. 525, 126 A. 715; Security Trust & Safe Deposit Co. v. Ward, 10 Del.Ch. 408, 93 A. 385; Wilmington Trust Co. v. Wilmington Trust Co., supra; Restatement of Trusts, § 57(1); 1 Scott on Trusts, § 57.1

The case of *In re Pengelly's Estate*, supra, does not aid the opponents of the Trust because that case is distinguishable on its facts. There it was found by the Court that the trust instrument merely continued a previously existing agency relationship and the Settlor had reserved complete power to control the Trustee in the administration of the trust. Moreover, the Court in the cited case was concerned with the public policy requiring protection of the rights of widows. The cases of *Frederick's Appeal*, supra, and *In re Hurley's Estate*, supra, are likewise clearly distinguishable on their facts and of no assistance.

[15] It is held that the Agreement of 1935 created a valid *inter vivos* Trust. Since the Trust was valid, the exercises of the power of appointment thereunder by the Instruments of 1949 and 1950 were valid. *Wilmington Trust Co. v. Wilmington Trust Co.*, supra. Accordingly, the distributions made by Wilmington Trust Company constituted a proper discharge of its duties as Trustee under its Agreement with Mrs. Donner.

The motions for summary judgment filed by the Lewis defendants will be denied. The other motions for summary judgment filed herein will be granted.

JUDGMENT.

AND NOW TO-WIT this 13th day of January, A.D. 1956, the above entitled action for a declaratory judgment and other and further relief having been referred for hearing and determination to the Honorable Daniel L. Herrmann as Acting Vice Chancellor by order of July 19, 1955; and having come on to be heard upon (1) the Motion for Summary Judgment of Edwin D. Steel, Jr., guardian *ad litem* for Joseph Donner Winsor, Donner Hanson and Curtin Winsor, Jr. filed November 18, 1954, (2) the Motion for Summary Judgment of Wilmington Trust Company filed June 21, 1955, and (3) the Motion for Summary Judgment of Dora Stewart Lewis, Mary Washington Stewart Borie and Paula Browning Denckla filed July 22, 1955; and the Court having considered the pleadings and exhibits, affidavits, depositions, certified copies of the Florida proceedings and other documents filed in support of and in opposition to said motions for summary judgment; briefs having been filed and the Court having heard oral argument; and the Court having found that there is no genuine issue as to any material fact and having concluded that Edwin D. Steel, Jr., guardian *ad litem* for Joseph Donner Winsor, Donner Hanson and Curtin Winsor, Jr., and Wilmington Trust Company are entitled to judgment as a matter of law; and the Court having filed its Opinion dated December 28, 1955;

AND it appearing that prior to the entry of said Order of Reference of July 19, 1955, several other motions had been filed and were pending to-wit:

Motion of Defendants Dora Stewart Lewis, Mary Washington Stewart Borie and Paula

Browning Denckla to Dismiss filed September 27, 1954;

Motion of Wilmington Trust Company and Delaware Trust Company filed February 17, 1955 for default judgment under Rule 55(b);

Motion of Robert B. Walls, Jr., guardian *ad litem* of Dorothy B. R. Stewart filed February 18, 1955 to strike motion of Wilmington Trust Company and Delaware Trust Company for default judgment;

Motion of Defendants Dora Stewart Lewis, Mary Washington Stewart Borie and Paula Browning Denckla filed February 23, 1955 to strike motion of Wilmington Trust Company and Delaware Trust Company for default judgment;

and it appearing that subsequent to the entry of said Order of Reference of July 19, 1955 several additional motions, a counterclaim and two cross claims were filed, to-wit:

Counterclaim of defendants Dora Stewart Lewis, Mary Washington Stewart Borie and Paula Browning Denckla against Elizabeth Donner Hanson, Executrix and Trustee, etc. filed July 22, 1955;

Cross claim of defendants Dora Stewart Lewis, Mary Washington Stewart Borie and Paula Browning Denckla against Wilmington Trust Company and Delaware Trust Company filed July 22, 1955;

Motion of Edwin D. Steel, Jr., guardian *ad litem* as aforesaid filed September 22, 1955 for default judgment pursuant to Rule 55(b);

Motion of Robert B. Walls, Jr., guardian *ad litem* of Dorothy B. R. Stewart filed September 22, 1955 to strike motion of Edwin D. Steel, Jr., guardian *ad litem* as aforesaid, for default judgment; and

Motion of defendants Dora Stewart Lewis, Mary Washington Stewart Borie and Paula Browning Denckla filed September 2, 1955 to strike motion of Edwin D. Steel, Jr., guardian *ad litem* as aforesaid for default judgment;

and it appearing to the Court that the disposition of all of said additional motions, the counterclaim and two cross claims is now appropriate because of the disposition of said three motions for summary judgment made by Paragraphs (1) and (2) of this Order;

IT IS ORDERED, ADJUDGED AND DECREED

(1) That the Motion to Dismiss filed September 27, 1954 and the Motion for Summary Judgment filed July 22, 1955 by defendants Dora Stewart Lewis, Mary Washington Stewart Borie and Paula Browning Denckla be and the same hereby are denied;

(2) That the Motion for Summary Judgment of Edwin D. Steel, Jr., guardian *ad litem* for Joseph Donner Winsor, Donner Hanson and Curtin Winsor, Jr. filed November 18, 1954 and the Motion for Summary Judgment of Wilmington Trust Company filed June 21, 1955 be and the same hereby are granted, and in accordance with said motions and the prayers of the complaint it is expressly adjudged, declared and determined:

(a) That by virtue of the Agreement of March 26, 1935 between Dora Browning Donner and Wilmington Trust Company, a copy

of which is attached as Exhibit B to the Complaint filed herein, there was created a valid trust under the laws of the State of Delaware;

(b) The execution and delivery by Dora Browning Donner (sometimes referred to as Dora E. Donner) to the Wilmington Trust Company of the document dated December 3, 1949 (Complaint Exhibit C), and the execution and delivery by Dora Browning Donner to the Wilmington Trust Company of the document dated July 7, 1950, (Complaint Exhibit D), constituted valid and effective exercises of the power of appointment reserved to Dora Browning Donner under the agreement dated March 25, 1935, between Dora Browning Donner and Wilmington Trust Company (Complaint Exhibit B).

(c) The payments referred to in paragraph 15 of complaint made by Wilmington Trust Company, Trustee under the agreement dated March 25, 1935 between Dora Browning Donner and Wilmington Trust Company, to Delaware Trust Company, Trustee under Trusts No. 9022 and 9023, in accordance with paragraph 2(a) of the instrument dated December 3, 1949 (confirmed by paragraph 2 of the instrument dated July 7, 1950) were valid and proper payments and constituted a lawful discharge of Wilmington Trust Company's duty as Trustee under said Agreement of March 25, 1935.

(d) In addition to the payments specified in the preceding subparagraph (c) each and every other distribution made by defend-

ant Wilmington Trust Company of property held by it pursuant to said Agreement of March 25, 1955 between Dora Browning Donner and Wilmington Trust Company as set forth in paragraph 15 of the Complaint were valid and proper distributions and constituted a lawful discharge of Wilmington Trust Company's duty as Trustee under said Agreement of March 25, 1935.

(3) All parties to this litigation are forever bound by the declarations, adjudications and determinations contained in subparagraphs (a), (b), (c) and (d) of Paragraph (2) hereof.

(4) That the counterclaim of defendants Dora Stewart Lewis, Mary Washington Stewart Borie and Paula Browning Denckla against Elizabeth Donner Hanson, as Executrix and Trustee under the last Will and Testament of Dora Browning Donner, deceased, filed July 22, 1955, be and the same hereby is dismissed with prejudice.

(5) That the cross-claims of defendants Dora Stewart Lewis, Mary Washington Stewart Borie and Paula Browning Denckla against Delaware Trust Company and Wilmington Trust Company filed July 22, 1955 be and the same hereby are dismissed with prejudice.

(6) That pursuant to Rule 55(b) and in accordance with the motion of Edwin D. Steel, Jr., guardian *ad litem* as aforesaid, filed September 22, 1955 and with the motion of Wilmington Trust Company and Delaware Trust Company filed February 17, 1955, judgment by default with respect to all matters, property rights and interests, legal and equitable, decreed, adjudicated and determined by Paragraph (2) (including sub-

paragraphs (a), (b), (c) and (d) thereof) and Paragraph (3) of this Judgment is granted against the following named defendants for the reason that they have failed to appear and answer the complaint herein on or before September 10, 1954, pursuant to the orders of the Court herein entered on July 29, 1954 and August 12, 1954 and have not appeared or answered up to this time:

Katherine N. R. Denckla

Hebe Sound, Florida

Elwyn E. Middleton, Guardian of the
property of Dorothy B. R. Stewart, a
mentally ill person,

Harvey Building

West Palm Beach, Florida

Bryn Mawr Hospital

Bryn Mawr, Pennsylvania

Miriam V. Moyer

1710 Fidelity-Philadelphia Bldg.

Philadelphia, Pa.

James Smith

221 Williams Street

Rosemont, Pa.

Walter Hamilton

Rosemont, Pa.

Dorothy A. Doyle

5108 Penn Street

Philadelphia 24, Pa.

Ruth Brenner

4224 Osage Avenue

Philadelphia 4, Pa.

Mary Glackens

4930 Westminster Avenue

Philadelphia 31, Pa.

Louisville Trust Company, as Trustee
for Benedict H. Hanson and as Trustee
under Agreements with William H.
Donner,

Louisville, Kentucky

Benedict H. Hanson

510 Park Avenue

New York, New York

William Donner Roosevelt

2540 South Ocean Boulevard

Palm Beach, Florida

John Stewart

Beechwood Road

Rosemont, Pa.

(7) That (1) the Motion of Robert B. Walls, Jr., guardian *ad litem* of Dorothy B. R. Stewart, filed February 18, 1955, to strike motions of Wilmington Trust Company and Delaware Trust Company for default judgment under Rule 55(b), (2) the Motion of Dora Stewart Lewis, Mary Washington Stewart Borie and Paula Browning Denckla filed February 23, 1955 to strike motion of Wilmington Trust Company and Delaware Trust Company for default judgment under Rule 55(b), (3) the Motion of Robert B. Walls, Jr., guardian *ad litem* of Dorothy B. R. Stewart filed September 22, 1955 to strike motion of Edwin D. Steel, Jr., guardian *ad litem* as aforesaid, for default judgment under Rule 55(b), and (4) the Motion of Dora Stewart Lewis, Mary Washington Stewart Borie and Paula Browning Denckla filed September 27, 1955 to strike Motion of Edwin D. Steel, Jr., guardian *ad litem* as aforesaid, for default judgment under Rule 55(b), be and the same hereby are respectively denied.

(8) That upon application of any interested party this Court will determine what counsel fees, expenses and disbursements shall be allowed out of any *res* before this Court, and jurisdiction is hereby reserved for that purpose.

D. L. Herrmann

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MOTION FOR NEW TRIAL.

(Filed January 20, 1956.)

COME NOW, Dora Stewart Lewis, Mary Washington Stewart Borie and Paula Browning Denckla, by and through their attorneys, Arthur G. Logan and Aubrey B. Lank, and pursuant to Rule 59 of the Rules of the Court of Chancery of the State of Delaware MOVE this Court for a new trial and as grounds therefore say:

1. That this Court has failed to give full faith and credit to a judgment of the Circuit Court of Palm Beach County, Florida, known as "Katherine N. R. Denckla, individually, et al., Plaintiffs, vs. Wilmington Trust Company, a Delaware corporation, et. al., Defendants" in Chancery number 31,980, dated January 14, 1955, in accordance with Article 4, Section 1 of the Constitution of the United States.

2. That this Court erred as a matter of law in holding that any present interest passed to the beneficiaries under the Agreement of March 25, 1935, between Dora Browning Donner and Wilmington Trust Company, and the powers of appointment purportedly executed in conformity therewith.

3. That this Court erred as a matter of law in finding that the doctrine of collateral estoppel does not apply against all the appearing parties to this action.

4. That this Court erred as a matter of fact and law in holding the Agreement of March 25, 1935 a valid trust agreement when both in fact

and law said Agreement was and is an agency agreement by reason of the controls retained by the alleged settlor or trustor, Dora Browning Donner, and by reason of the controls which she reserved through the so-called advisor to this alleged trust.

5. That this Court erred as a matter of fact in holding that the relationship between the so called settlor or trustor, Dora Browning Donner, and her first advisor was not an existing agency at the time of the execution of the Agreement on March 25, 1935, in that the affidavit of C. Kenneth Baxter dated December 27, 1954, shows that he was, prior to and on March 25, 1935, an investment advisor to William Hanson Donner and members of his family, which included Dora Browning Donner, and companies owned or controlled by them.

6. That this Court erred as a matter of law in granting the Defendants, Wilmington Trust Company, Delaware Trust Company and Edwin D. Steel, Jr., Esquire, guardian *ad litem* for Joseph Donner Winsor, Curtin Winsor, Jr. and Donner Hanson, Motions for Summary Judgment in that there is a factual dispute as to whether an agency existed between Dora Browning Donner and the first settlor and whether it continued after the alleged trust was entered into on March 25, 1935.

7. That this Court erred as a matter of law in holding that a settlor or trustor must consent to any surrender of duties between a trustee and an advisor pertaining to the operation of the trust, where as here the advisor and trustee were both the agents of the settlor.

8. That this Court erred as a matter of law in holding that the alleged trustor intended to create a valid trust on March 25, 1935, as such intent must be read from the trust instrument itself and such intent is lacking in the alleged trust agreement of March 25, 1935.

/s/Arthur G. Logan

/s/ Aubrey B. Lank

Attorneys for Defendants, Dora
Stewart Lewis, Mary Washing-
ton Stewart Borie and Paula
Browning Denckla,
400 Continental American
Building,
Wilmington, Delaware.

Dated: January 19, 1956.

ORDER.**(Filed January 25, 1956.)**

AND NOW, TO WIT: this 25th day of January, A.D. 1956, the Motion of Dora Stewart Lewis, Mary Washington Stewart Borie and Paula Browning Denckla, For New Trial pursuant to Rule 59 of the Rules of the Court of Chancery of the State of Delaware, filed herein on January 20, 1956, having come on to be heard, IT IS

ORDERED, ADJUDGED and DECREED that the said Motion For New Trial filed herein by Dora Stewart Lewis, Mary Washington Stewart Borie and Paula Browning Denckla, be and the same hereby is denied.

/s/ D. L. Herrmann
Judge

[fol. 203] EXCERPT FROM BAXTER AFFIDAVIT (November 12, 1954, Par. 9). Omitted. Printed side page A 112 ante.

[fol. 204] EXCERPT FROM BAXTER AFFIDAVIT (November 12, 1954). Omitted. Printed side page 329 infra.

[fol. 205] IN THE SUPREME COURT OF THE
STATE OF DELAWARE

No. 8, 1956

APPEAL FROM THE COURT OF CHANCERY OF THE STATE OF
DELAWARE IN AND FOR NEW CASTLE COUNTY,
CIVIL ACTION NO. 531

DORA STEWART LEWIS, MARY WASHINGTON STEWART BORIE
and PAULA BROWNING DENCKLA, Defendants Below,
Appellants,

v.

ELIZABETH DONNER HANSON, as Executrix and Trustee
under the Last Will of Dora Browning Donner, de-
ceased, Plaintiff Below, Appellee,

WILMINGTON TRUST COMPANY, a Delaware corporation,
Trustee, etc., et al., Defendants Below, Appellees.

MOTION OF ROBERT B. WALLS, JR., GUARDIAN AD LITEM
FOR LEAVE TO FILE JOINT BRIEFS WITH APPELLANTS—
Filed April 13, 1956

Robert B. Walls, Jr., respectfully represents:

1. He is the duly appointed guardian ad litem for
Dorothy B. R. Stewart, a mentally incompetent person,
and for William Donner Denckla, an infant.

2. As such guardian ad litem, he participated fully in
the litigation in the Court below, the Court of Chancery.

3. As such guardian, he is an appellee in this Court in
the above captioned cause.

4. In the proceedings below, he took the same position as to the issues as did the appellants in this Court.

5. In the appeal proceedings in this Court, he will take the same position as he did below, and as the appellants did below.

6. He desires to join the said appellants in the preparation of and filing of briefs because both are in accord in their respective positions as to the issues involved.

[fol. 206] Wherefore, Robert B. Walls, Jr., guardian ad litem, moves that he be given leave to join the appellants herein in filing briefs in this Court.

Robert B. Walls, Jr., Guardian ad litem for Dorothy B. R. Stewart and William Donner Denckla, 500 Industrial Trust Building, Wilmington, Delaware.

April 11th, 1956

Leave granted:

Daniel F. Wolcott, J.

[fol. 208] [File endorsement omitted]

[fol. 209] IN THE SUPREME COURT OF THE
STATE OF DELAWARE

[Title omitted]

ORDER ASSIGNING ASSOCIATE JUDGE CALEB R. LAYTON, III,
ETC.—August 20, 1956

And Now, to wit, this twentieth day of August, 1956, Chief Justice C. A. Southerland having disqualified himself in the above entitled cause;

It Is Ordered that Associate Judge Caleb R. Layton, III, is hereby assigned temporarily to fill up the number of the Court to three Justices.

Daniel F. Wolcott, J.

[File endorsement omitted]

[fol. 210] IN THE SUPREME COURT OF THE
STATE OF DELAWARE

[Title omitted]

ORDER RESCINDING THE ASSIGNMENT OF JUDGE CALEB R.
LAYTON, III AND NAMING JUDGE JAMES B. CAREY, ETC.—
September 4, 1956

And Now, to-wit, this 4th day of September, 1956, it appearing that Associate Judge Caleb R. Layton, 3rd, who, by order of August 20, 1956, was assigned temporarily to fill up the number of the Court to three Justices, the Chief Justice having disqualified himself in the above cause, and

It Further Appearing that Associate Judge Caleb R. Layton, 3rd, has now disqualified himself by reason of circumstances not realized at the time of the said order of August 20, 1956,

It Is Therefore Ordered As Follows:

1. The order of August 20, 1956 assigning Associate Judge Caleb R. Layton, 3rd, to fill up the number of the Court, be and it hereby is rescinded:

2. Associate Judge James B. Carey is hereby assigned temporarily to fill up the number of the Court to three Justices.

:/s/ Daniel F. Wolcott, J.

[fol. 211] IN THE SUPREME COURT OF THE
STATE OF DELAWARE

[Title omitted]

MOTION TO REMAND—Filed November 9, 1956

Come Now, Dora Stewart Lewis, Mary Washington Stewart Borie and Paula Browning Denckla, by their attorneys, Arthur G. Logan and Aubrey B. Lank, and Move the Court to remand the above cause to the Court of

Chancery of the State of Delaware in and for New Castle County, and as grounds therefore respectfully represent:

1. On September 19, 1956, the Supreme Court of the State of Florida, in a certain action entitled "Elizabeth Donner-Hanson, individually and as Executrix, et al., Appellants, vs. Katherine N. R. Denckla, individually, et al., Appellees", case number 27622, directed the reversal in part of a Summary Final Decree of the Circuit Court of the Fifteenth Judicial Circuit of Florida in and for Palm Beach County, in Chancery, dated January 14, 1955, in a certain action entitled "Katherine N. R. Denckla, etc., et al., Plaintiffs, vs. Wilmington Trust Company, a Delaware corporation, et al., Defendants", known as case number 31980, referred to in the Opinion of the court below, which reversal was with respect to the jurisdiction of the Circuit Court of the Fifteenth Judicial Circuit of Florida, in and for Palm Beach County, over certain non-appearing defendants in said action including Wilmington Trust Company, a corporation of the State of Delaware, and Delaware Trust Company, a corporation of the State of Delaware, parties hereto. A copy of the opinion of the Supreme Court of Florida so holding is annexed hereto and incorporated herein by reference.

2. The Honorable Daniel L. Herrmann, acting Vice-Chancellor, did not have before him at the time of the entry of the Judgment in this cause, dated January 13, 1956, the opinion of the Supreme Court of the State of Florida.

3. Had the Supreme Court of the State of Florida acted prior to the Judgment dated January 13, 1956, your petitioners verily believe that the Judgment of the Honorable Daniel L. Herrmann, acting Vice-Chancellor, on the question of res judicata or collateral estoppel, would have been in favor of the appellants since he would have had to hold that all of the necessary parties hereto had been subject to the jurisdiction of the Circuit Court of the Fifteenth Judicial Circuit, in and for Palm Beach County, Florida, under the full faith and credit clause of the Constitution of the United States.

Wherefore, your petitioners pray that this action be remanded to the Court of Chancery of the State of Delaware in and for New Castle County with instructions to open the judgment dated January 13, 1956, and give full faith and credit to the final decision of the Supreme Court of the State of Florida and to hold that the appellees are estopped by the decision of the Supreme Court of the State of Florida from relitigating the issues decided by that Court; and for such other relief as this Honorable Court deems meet and just.

Arthur G. Logan, Aubrey B. Lank, Attorneys for
Petitioners, Appellants Dora Stewart Lewis, Mary
Washington Stewart Borie and Paula Browning
Denckla, 400 Continental American Bldg., Wil-
mington, Delaware.

[fol. 214]

ATTACHMENT TO MOTION

IN THE SUPREME COURT OF FLORIDA
JUNE TERM, A. D. 1956, SPECIAL DIVISION A.

Case No. 27,622

ELIZABETH DONNER HANSON, individually and as executrix,
et al., Appellants,

v.

KATHERINE N. R. DENCKLA, individually, et al., Appellees.

Opinion filed September 19, 1956.

An Appeal from the Circuit Court for Palm Beach County,
C. E. Chillingworth, Judge.

Caldwell, Pacetti, Robinson & Foster and Manley P. Cald-
well for Elizabeth Donner Hanson, Individually, as Execu-
trix of the Will of Dora Browning Donner, Deceased, as
Guardian Ad Litem for Joseph Donner Winsor and Donner
Hanson, and William Donner Roosevelt, Individually; Mc-

Carthy, Lane & Adams, Edward McCarthy and William H. Foulk (Wilmington, Delaware) for Elizabeth Donner Hanson as Guardian Ad Litem for Joseph Donner Winsor and Donner Hanson, Appellants.

C. Robert Burns and Redfearn & Ferrell, for Appellees.

HOBSON, J.:

This is an appeal by defendants from a summary final decree holding that assets of a trust created by Dora Donner during her lifetime passed under her will. Cross-assignments of error have been filed by the plaintiffs, who contend that the chancellor erred in holding that he had no jurisdiction over some of the defendants, the trustee and certain beneficiaries under the trust, who did not answer the complaint.

The essential facts of the case are not in dispute. Dora Donner died in Palm Beach, Florida, on November 20, 1952, leaving a will dated December 3, 1949, which was probated in Palm Beach County. She was formerly a citizen of Pennsylvania, but made her permanent home in Palm Beach County on or about January 15, 1944, and remained domiciled in Florida until she died:

[fol. 215] On March 25, 1935, the testatrix executed a trust instrument in which she named the Wilmington Trust Company, a Delaware corporation, as trustee. The trust instrument provided in part as follows:

"Trustee shall pay over the net income of the trust fund unto Trustor, for and during the term of her natural life. Upon the death of Trustor Trustee shall assign, transfer, convey and deliver this trust fund, principal and undistributed income thereof, if any, free from this trust, unto such person or persons and in such manner and amounts and upon such trusts, terms and conditions as Trustor shall have appointed by the last instrument in writing which she shall have executed and delivered to Trustee, or failing such instrument, by her last Will and Testament, or in default of any such appointment then unto the then living issue of Trustor, per stirpes and not per capita."

The trust assets consisted entirely of intangible personalty.

On April 6, 1935, Mrs. Donner executed a power of appointment under the terms of the trust. On October 11, 1939, she executed a new power of appointment, amending the previous power.

On December 3, 1949 (the same day she executed her will, and while domiciled in Florida), Mrs. Donner executed an instrument entitled "Donner * First Power of Appointment" wherein she revoked all previous exercises of the power of appointment under the trust and ordered that certain sums be paid to a different set of beneficiaries.

On July 7, 1950, she executed an instrument entitled "Donner * Second Power of Appointment" amending the instrument of December 3, 1949. This was the last "power of appointment" the testatrix exercised before her death.

In her will, after making certain specific directions and bequests, the testatrix provided in part as follows:

[fol. 216] "FIFTH: All the rest, residue and remainder of my estate, real personal and mixed, whatsoever and wheresoever the same may be at the time of my death, *including any and all property, rights and interest over which I may have power of appointment which prior to my death has not been effectively exercised by me or has been exercised by me in favor of my Executrix, I direct my Executrix to deal with as follows, namely:—*"

[Here follow certain directions and the names of residuary legatees, plaintiff-appellees here.] (*Italics supplied.*)

The complaint for declaratory decree in this case was filed for the purpose of determining what passes under the residuary clause of the will quoted above. This determination, of course, requires a study of the trust agreement of March 25, 1935, and the powers of appointment exercised thereunder, to determine whether or not such powers as the testatrix had were "effectively exercised" under the terms of the will. On this issue, the chancellor held in part:

"Concerning the declaration of trust dated March 25, 1935, and particularly the power of appointment dated December 3, 1949, no present interest passed to any beneficiary other than the Trustor (Testatrix). It seems clear to me, from the authorities, that the power of appointment was testamentary in character and did not constitute a valid inter vivos trust appointment. As the appointment had only one subscribing witness, rather than two, as required in Florida, it did not constitute a valid testamentary disposition. Hence, the executrix should receive the assets and dispose of them agreeable to the will under which she was appointed."

[fol. 217] After this final decree was entered, a suit which had been brought in Delaware by Elizabeth Donner Hanson, as executrix and trustee under the Donner will (one of the appellants herein) to determine the validity of the trust agreement resulted in a summary judgment of the Court of Chancery of the State of Delaware in and for New Castle County, holding that the trust was valid. An appeal from this judgment is pending in Delaware but, so far as the record here before us shows, has not yet been determined.

Appellants have lodged with us a copy of the Delaware chancellor's opinion and judgment and, on the basis thereof, have moved to remand the instant case with directions to dismiss it, taking the position that the Delaware judgment is dispositive of the main issue raised on this appeal.

We shall first consider the contention of appellants that the circuit court of Palm Beach County erred in holding the trust and the powers of appointment exercised thereunder invalid as testamentary in character. As a preliminary inquiry, it is necessary to determine whether or not jurisdiction existed in the courts of Florida to pass upon the validity of these instruments.

There can be no doubt that the court below possessed substantive jurisdiction to determine this issue. Jurisdiction existed by virtue of the will, which had been duly probated in Florida, the testatrix' domiciliary state. Reference having been made in the will, as we have seen, to

powers of appointment, and the question of effective exercise thereof having been properly raised, the chancellor below had no alternative but to examine the trust instrument and documents executed thereunder and declare them valid or invalid. This is to be distinguished from a case wherein questions of administration or validity of a purported inter vivos trust arise absent a will or any reference therein. Cf. *Wilmington Trust Co. v. Wilmington Trust Co.*, Del., 24 A. 2d 309, wherein the settlor had executed a will "making no reference whatever to the power of appointment conferred on him by the [previously executed] trust agreement . . ." and it was held that the Delaware courts had jurisdiction to determine the validity of [fol. 218] trust powers, although the settlor died a domiciliary of another state. In the case now presented, it would have been an abdication or abandonment of jurisdiction, which we would have been obliged to correct, if the chancellor below had failed to answer the question which was duly brought before him for adjudication.

The next question is the source of the applicable law to test the validity of the attempted trust disposition. The trustee, Wilmington Trust Company, is a Delaware corporation with its principal place of business in Delaware. Securities representing the intangible personalty which forms the corpus of the trust are also located in Delaware. The settlor was domiciled in Pennsylvania when she executed the original trust instrument. The first two "powers of appointment", now revoked, were executed while the settlor was domiciled in Pennsylvania. But these considerations alone are insufficient to persuade us that the law of either Delaware or Pennsylvania is applicable, for reasons which will hereinafter appear.

Assuming, for the moment, that this was an inter vivos trust, the only exercises of the power of appointment which could have been intended to create an interest to be enjoyed at the settlor's death were those reflected in the documents of 1949 and 1950. The settlor obviously intended these documents, if any, to make the controlling disposition, for she revoked all previous exercises of the power and even called the 1949 and 1950 papers the "first" and "second" power of appointment respectively, although she

had previously executed similar instruments. The chancellor in Delaware, in expressing his opinion that the trust was valid under Delaware law, sanctioned payment to the remaindermen named in these last two powers of appointment. In the last analysis we, too, are concerned with the interests of these remaindermen in our inquiry as to whether or not the instruments which created their interests were effective to shift the trust property out of the estate of the testatrix. We do not question the validity of the beneficial life estate reserved by the settlor.

[fol. 219] It is urged upon us that the remaindermen possessed during the life of the settlor a present right of future enjoyment of the trust property. In making this argument, appellants state in part in their brief that:

... since the right to amend is specifically reserved in the Trust Agreement of March 25, 1935, *each appointment should be construed as an amendment to and a republication of the original agreement*. Therefore, the trust agreement and appointments thereunder must always be construed together." (Italics supplied.)

In *Henderson v. Usher*, 118 Fla. 688, 160 So. 9, we observed that an inter vivos trust usually has its situs at the residence of the creator of the trust, and we were considerably influenced in our consideration of this principle by the case of *Swetland v. Swetland*, 105 N. J. Eq. 608, 149 A. 50; *Id.*, 107 N. J. Eq. 504, 153 A. 907, which we viewed as "one of the leading cases in this country on the question". In the *Swetland* case the settlor had amended the trust, but had been domiciled in New Jersey both at the time of his execution of the original trust agreement and the amendment thereto. It was held that New Jersey law applied to test both agreements. The court in the *Swetland* case rejected the contention that the applicable law as to the trust necessarily followed the settlor wherever he might be domiciled after the trust was executed, and it is unnecessary for us to express any opinion regarding this principle. It is sufficient to observe that in the instant case the last effective acts, if any there were, of the settlor to establish remainder interests under the trust were accomplished while she was a Florida domiciliary, and we

consider the last powers of appointment as a republication of the original trust instrument, or as if the trust instrument had been executed while the settlor was domiciled in Florida. We consider this a far more realistic interpretation of these instruments than if we were to rule that the last powers of appointment should be construed to relate back to the date upon which the original [fol. 220] trust agreement was executed, because the effect of a "relation-back" view would be to establish an artificially early date for interests which were obviously not intended to be created by the settlor until much later. Hence we must consider the validity of the trust, and the remainder interests it sought to create, under Florida law, *Henderson v. Usher*, *supra*, 118 Fla. 688, 160 So. 9. Compare the rule sustaining the power of the domiciliary state to tax, and apply its tax law to, the exercise of a power to dispose of intangibles, although the trust fund and trustee are outside the state. *Graves v. Schmidlapp*, 315 U. S. 657, 86 L. Ed. 1097; *Bullen v. Wisconsin*, 240 U. S. 625, 60 L. Ed. 830.

The logic of the foregoing analysis is strongly buttressed in the instant case by the fact that the settlor chose, after she had come to Florida, which was to be her last domicile, to make an integrated pattern of arrangements for the disposition of her property. At this period of her life she desired to make final exercise of whatever powers she might have had under the earlier arrangement but was careful to provide in her will for the possible ineffectiveness of such exercise of power, making an unquestionably valid testamentary disposition to settle her entire estate if the doubtful powers of appointment failed.

Having decided that Florida law applies, we are next obliged to apply it. The validity of an attempted inter vivos trust such as this is a matter of first impression in this state. The trust instrument provided, as we have seen, that the settlor would receive all of the net income for life. The settlor reserved to herself the right to amend or revoke the trust agreement in whole or in part at any time. Many powers of the trustee could ordinarily be exercised by it only upon the written direction of, or with the written consent of, the "adviser" of the trust. These powers were the following:

“(b) To sell at public or private sale, exchange for like or unlike property, convey, lease for terms longer or shorter than the trust, and otherwise dispose [fol. 221] of any or all property, real or personal, held in the trust fund, for such price and upon such terms and credits as Trustee may deem proper.

“(c) To invest the proceeds of any such sale or sales, and any other money available for investment, in such stocks, bonds, notes, securities and/or other income producing property as may be deemed appropriate for this trust fund, irrespective of the rules of investment applying to trustees under any present or future laws of the State of Delaware or elsewhere.

* * * * *

“(e) To participate in any plan or proceeding for protecting or enforcing any right, obligation or interest arising from any stock, bond, note or security held in the trust fund, or for reorganizing, consolidating, merging or adjusting the finances of any corporation issuing the same, to accept in lieu thereof any new or substituted stocks, bonds and/or securities, to pay any assessment or any expense incident thereto, and to do any other act or thing that Trustee may deem necessary or advisable in connection therewith.”

As “advisor” the settlor named her husband or “such other person or persons as trustor may nominate in writing delivered to trustee during her lifetime”. Finally, and very significantly, the settlor reserved to herself the power of appointment, which we have discussed above, with a view to naming beneficiaries to take remainder interests in the trust after her death.

Although any of these reservations of power in the settlor, standing alone, might not have been enough to render the trust invalid (cf. *Williams v. Collier*, 120 Fla. 248, 162 So. 868, wherein we upheld a revocable trust reserving a life interest to the settlor, with remainder payable to named grandchildren) the cumulative effect of [fol. 222] the reservations was such that the relationship established divested the settlor of virtually none of her

day-to-day control over the property or the power to dispose of it on her death, and the trust was illusory. See *Burns v. Turnbull*, 294 N. Y. 889, 62 N. E. 2d 785; *In re Tunnell's Estate*, 325 Pa. 554, 190 A. 906; *In re Shapley*, 353 Pa. 499, 46 A. 2d 227; *Hurley's Estate*, 17 Pa. D. & C. 637; *Warsco v. Oshkosh Savings & Trust Co.*, 183 Wis. 156, 196 N. W. 829; *Steinke v. Sztanka*, 364 Ill. 334, 4 N. E. 2d 472. In Scott, Trusts and the Statute of Wills, 43 Harv. L. R. 521, 529, the author states:

"Suppose that the settlor reserves not merely a life interest and a power to revoke the trust in whole or in part and to modify the trust, but reserves also a power to control the trustee in the administration of the trust. In such a case, there is authority to the effect that the trust is in substance testamentary and is invalid unless declared in an instrument executed in accordance with the requirements of the Statute of Wills."

Another common principle is reflected in Restatement of Trusts, Sec. 56, which reads as follows:

"Where the owner of property purports to create a trust inter vivos but no interest passes to the beneficiary before the death of the settlor, the intended trust is a testamentary trust and is invalid unless the requirements of the statutes relating to the validity of wills are complied with."

Appellants contend that Illustration 8 under Subsection g. of this section is "exactly our case". This illustration reads as follows:

"8. A transfers certain securities to B in trust to pay the income to A for life and upon A's death to convey the securities to such person as may be designated in a letter to be delivered by A to B on the following [fol. 223] day. On the following day A delivers a letter to B designating C as the person entitled to receive the securities on A's death. A valid trust for C is created, since an interest passes to C during the life of A."

The above illustration represents the instant trust in some particulars, but is an oversimplification of the facts be-

fore us. It relates to a single exercise of a power of appointment, rather than frequently revoked and amended exercises of power, such as appear in the case before us, which would demonstrate that the settlor considered the appointments to be ambulatory in nature and exactly like successive wills or codicils in their operation. The illustration given, moreover, does not consider the element of control, which we have discussed above. This is treated in Sec. 57 of the Restatement, Subsection g. of which reads in part as follows:

"If the settlor reserves a beneficial life estate and power to revoke or modify the trust and such power to control the trustee as to the details of the administration of the trust that the trustee is his agent, the intended disposition so far as it is intended to take effect after his death is invalid unless the requirements of the Statute of Wills are complied with, but the intended trust is valid so far as the beneficial life estate of the settlor is concerned."

Illustration 5 reads as follows:

"5. A, the owner of shares of stock, delivers the certificates to the B Trust Company to hold and deal with as custodian, to receive the income and pay it over to A, and with power to sell the shares and to reinvest the proceeds. In order to carry out these purposes the shares are registered in the name of the trust company. A writes a letter to the trust company directing it to convey the shares on A's death to C, [fol. 224] unless A should otherwise direct. A dies. The intended disposition in favor of C is testamentary, and C is not entitled to the shares unless the requirements of the Statute of Wills are complied with."

True it is that in the situation posed in Illustration 5 the action taken by A, the settlor, is somewhat less formal than the action taken by the settlor herein, and while this is a circumstance which would tend to uphold the validity of the instant trust, we do not consider it controlling when weighed against the multiple reservations of power we have discussed.

We reemphasize that we do not, and need not, hold that the reservation of the power of appointment, or any other

factor standing alone, would suffice to invalidate the remainder interests sought to be created under this trust. It is enough to observe that if, as to the remaindermen, this trust is not invalid as an agency agreement, and testamentary as the court below found, it is difficult to understand what further control could be retained by a settlor to produce this result, and the principles to which we have alluded above would lose their meaning. We have been shown no error in the chancellor's ruling on this aspect of the case, which accordingly must be affirmed.

We next consider the contention made on the cross-appeal that the chancellor erred in ruling that he lacked jurisdiction over the persons of certain absent defendants, summoned to appear by constructive service of process. These defendants were the trustee and persons who would benefit under the last power of appointment executed under the trust, and against the will. In *Henderson v. Usher*, supra, 160 So. 9, we upheld constructive service of a citizen of New York, although the trust "res", consisting entirely of intangible personalty, was physically located in New York, and the trust was administered there by the Chase National Bank of New York, as trustee. We held that constructive service was valid in that state of the record because substantive jurisdiction existed in the Florida court by virtue of construction of a will, which was also involved, the testator having been domiciled in Florida. We observed that it was not essential that the [fol. 225] assets of the trust be physically in this state in order that constructive service be binding upon a non-resident where the problem presented to the court was to adjudicate, inter alia, the status of the securities incorporated in the trust estate and the rights of the non-resident therein. It is entirely consistent with the *Henderson* case to hold, as we do, that the court below erred in ruling that it lacked jurisdiction over the persons of the absent defendants. With this view of the case, we need not consider the contention of cross-appellees that the absent defendants are necessary parties under *Martinez v. Balbin*, Fla., 76 So. 2d 488.

Finally, we mention again the motion to remand on the basis of the decree of the Delaware court. Since we hold that we have jurisdiction of the matter presented, and that

Florida law is exclusively applicable thereto, this motion must be denied.

Affirmed in part; reversed in part.

Terrell, Acting Chief Justice, Thornal and O'Connell, JJ.,
Concur.

[fol. 226] IN THE SUPREME COURT OF FLORIDA

I, GUYTE P. McCORD, Clerk of the Supreme Court of Florida, do hereby certify that the above attached and twelve foregoing pages is a true and correct copy of the Opinion and Judgment of the Supreme Court of Florida in that certain cause recently pending in said Court wherein Elizabeth Donner Hanson, individually and as executrix, et al., were appellants, and Katherine N. R. Denckla, individually, et al., were appellees, which was filed in said Court on September 19th, 1956, all as the same appears among the records and files of my said office. This Opinion and Judgment will not become final until after fifteen days from the date of filing said Opinion as aforesaid and if a petition for rehearing is filed within said fifteen-day period it will not become final until the petition for rehearing is acted on and disposed of.

In Witness Whereof, I have hereunto set my hand and affixed the Seal of the Supreme Court of Florida, at Tallahassee, the capital, on this the 21st day of September, A. D. 1956.

Guyte P. McCord, Clerk of the Supreme Court of Florida.

[fol. 227] IN THE SUPREME COURT OF THE
STATE OF DELAWARE

[Title omitted]

STIPULATION PERTAINING TO REMAND AND ORDER THEREON—
November 13, 1956

It is hereby stipulated and agreed by and between the parties hereto, through their respective attorneys, subject to the approval of the Court, that:

1. The certified copy of the opinion filed September 19, 1956 in the Supreme Court of Florida, which is attached to the motion to remand of Dora Stewart Lewis, et al., filed herein shall be deemed to have been admitted in evidence in the Court of Chancery of the State of Delaware in and for New Castle County upon proffert thereof by Dora Stewart Lewis, et al., as if upon a remand from this Court pursuant to the aforesaid motion, and the opinion shall be deemed to have the same force and effect in this Court as if it had been so admitted in evidence in the Court of Chancery.

2. None of the Appellees, by entering into this stipulation or otherwise, concede the materiality or relevancy of said opinion but each of them expressly reserves the right to challenge the materiality or relevancy thereof in this or in any other Court.

/s/ Arthur G. Logan, Continental American Bldg., Wilmington, Delaware, Attorney for Dora Stewart Lewis, et al.

/s/ C. S. Layton, DuPont Building, Wilmington, Delaware, Attorney for Wilmington Trust Co., Trustee.

/s/ R. B. Walls, Jr., Industrial Trust Building, Wilmington, Delaware, Guardian ad litem for Dorothy B. R. Stewart, et al.

/s/ David F. Anderson, Delaware Trust Building, Wilmington, Delaware, Attorney for Delaware Trust Co., Trustee.

/s/ Edwin D. Steel, Jr., DuPont Building, Wilmington, Delaware, Guardian ad litem for Joseph Donner Winsor, Curtin Winsor, Jr., and Donner Hanson.

So Ordered this 13th day of November, 1956.

/s/ Daniel F. Wolcott, J.

/s/ James B. Carey, J.

/s/ Howard W. Bramhall, J.

[fol. 229] IN THE SUPREME COURT OF THE
STATE OF DELAWARE

[Title omitted]

STIPULATION, PERTAINING TO FLORIDA ORDER DENYING
PETITION FOR REHEARING AND ORDER GRANTING STAY—
December 26, 1956.

It is hereby stipulated and agreed by and between the parties hereto, through their respective attorneys, subject to the approval of the Court, that:

1. The certified copies of the orders entered by the Supreme Court of Florida on November 28, 1956, in the cause therein pending captioned "Elizabeth Donner Hanson, individually and as executrix, et al., Appellants, vs. Katherine N. R. Denckla, individually, et al., Appellees" denying a petition for rehearing and granting a stay, which are annexed hereto, shall be deemed to have been admitted [fol. 230] in evidence in the Court of Chancery of the State of Delaware in and for New Castle County upon proffert thereof by Dora Stewart Lewis, et al., as if upon a remand from this Court, and such orders shall be deemed to have the same force and effect in this Court as if they had been so admitted in evidence in the Court of Chancery.

2. None of the Appellees, by entering into this stipulation or otherwise, concede the materiality or relevancy of said orders, but each of them expressly reserves the right to challenge the materiality or relevancy thereof in this or in any other Court.

/s/ E. D. Steel, Jr., DuPont Building, Wilmington,
Delaware, Guardian ad litem for Joseph Donner
Winsor, Curtin Winsor, Jr., and Donner Hanson.

/s/ C. S. Layton, DuPont Building, Wilmington,
Delaware, Attorney for Wilmington Trust Co.,
Trustee.

/s/ Robert B. Walls, Jr., Industrial Trust Building,
Wilmington, Delaware, Guardian ad litem for
Dorothy B. R. Stewart, et al.

/s/ David F. Anderson, Delaware Trust Building,
Wilmington, Delaware, Attorney for Delaware
Trust Co., Trustee.

/s/ Arthur G. Logan, Continental American Bldg.,
Wilmington, Delaware, Attorney for Dora Stewart
Lewis, et al.

So Ordered this 26th day of December, 1956.

/s/ Daniel F. Wolcott, J.

/s/ Howard W. Bramhall, J.

/s/ James B. Carey, J.

[fol. 231] ATTACHMENT TO STIPULATION

IN THE SUPREME COURT OF FLORIDA, JUNE TERM, A. D. 1956
WEDNESDAY, NOVEMBER 28, 1956

ELIZABETH DONNER HANSON, individually and as
executrix, et al., Appellants,

—v.—

KATHERINE N. R. DENCKLA, individually, et al., Appellees.

On application of the appellants it is ordered that execution and enforcement of the judgment of this Court rendered herein on September 19th, 1956, petition for rehearing of said cause having this day been denied, be stayed for ninety days from this date to enable the appellants to have a reasonable time in which to apply for and to obtain, if they can, a review of said cause by the Supreme Court of the United States and the mandate of this Court to the trial court be withheld for said ninety-day period and if review is perfected that the mandate be held pending disposition of the cause by the Supreme Court of the United States. This order is subject to cancellation at any time if the appellant fails to prosecute review by the Supreme Court of the United States with reasonable dispatch.

[fol. 232] ATTACHMENT TO STIPULATION

IN THE SUPREME COURT OF FLORIDA, JUNE TERM, A. D. 1956
WEDNESDAY, NOVEMBER 28, 1956

ELIZABETH DONNER HANSON, individually and as
executrix, et al., Appellants,

—v.—

KATHERINE N. R. DENCKLA, individually, et al., Appellees.

The petition for rehearing filed by the appellants in the
above cause has been considered and said petition is denied.

[fol. 233] Clerk's Certificate to foregoing papers omitted
in printing.

[fol. 235] IN THE SUPREME COURT OF THE
STATE OF DELAWARE

No. 8, 1956

DORA STEWART LEWIS, MARY WASHINGTON STEWART BORIE
and PAULA BROWNING DENCKLA, Defendants Below,
Appellants,

v.

ELIZABETH DONNER HANSON, as Executrix and Trustee
under the Last Will of Dora Browning Donner, deceased,
Plaintiff Below, Appellee,

WILMINGTON TRUST COMPANY, a Delaware corporation, as
Trustee under three separate Agreements, (1) and (2)
with William H. Donner dated March 18, 1932 and March
19, 1932, and (3) with Dora Browning Donner dated
March 25, 1935, Defendant Below, Appellee,

DELAWARE TRUST COMPANY, a Delaware corporation, as
Trustee under three separate Agreements (1) with Wil-
liam H. Donner dated August 6, 1940, and (2) and (3)
with Elizabeth Donner Hanson, both dated November
26, 1948, Defendant Below, Appellee,

KATHERINE N. R. DENCKLA, Defendant Below, Appellee,

ROBERT B. WALLS, ESQUIRE, Guardian ad litem for Dorothy B. R. Stewart and William Donner Denckla, Defendant Below, Appellee,

ELWYN L. MIDDLETON, Guardian of the property of Dorothy B. R. Stewart, a mentally ill person, Defendant Below, Appellee,

EDWIN D. STEEL, JR., ESQUIRE, Guardian ad litem for Joseph Donner Winsor, Curtin Winsor, Jr., and Donner Hanson, Defendant Below, Appellee,

BRYN MAWR HOSPITAL, a Pennsylvania corporation, MIRIAM V. MOYER, JAMES SMITH, WALTER HAMILTON, DOROTHY A. DOYLE, RUTH BRENNER and MARY GLACKENS, Defendants Below, Appellees,

LOUISVILLE TRUST COMPANY, a Kentucky corporation, as Trustee for Benedict H. Hanson, and as Trustee under agreements with William H. Donner, Defendant Below, Appellee,

WILLIAM DONNER ROOSEVELT, JOHN STEWART and BENEDICT H. HANSON, Defendants Below, Appellees.

[fol. 236] WOLCOTT and BRAMHALL, Justices, and CAREY, Judge, sitting.

Appeal from a judgment of the Court of Chancery of New Castle County.

Arthur G. Logan and Aubrey B. Lank, of Wilmington, for appellants.

Robert B. Walls, Jr., Guardian *ad litem* for Dorothy B. R. Stewart and William Donner Denckla, appellee *pro se*.

Caleb S. Layton, of Wilmington, for Wilmington Trust Company, appellee.

David F. Anderson, of Wilmington, for Delaware Trust Company, appellee.

Edwin D. Steel, Jr., Guardian *ad litem* for Joseph Donner Winsor, Curtin Winsor, Jr., and Donner Hanson, appellee *pro se*.

OPINION—January 14, 1957

WOLCOTT, J.:

This appeal involves two fundamental questions: (1) Whether a purported *inter vivos* trust and the exercise of

a power of appointment under it are valid or invalid; and (2) Whether the parties may litigate the question of validity in a Delaware court because of an adverse adjudication upon the point by a Florida court.

The action below, commenced by Elizabeth Donner Hanson [fol. 227] son as the Florida executrix of the settlor's will and, also, in her capacity as trustee under the residuary clause of that will, seeks a declaratory judgment establishing the persons entitled to \$417,000 which was distributed by the *inter vivos* trustee pursuant to the exercise of the power of appointment.

The parties named as defendants in the action include Wilmington Trust Company, trustee under the trust agreement in question and, as such, the distributor of the \$417,000, Delaware Trust Company, trustee, the recipient of \$400,000 of the trust assets, the recipients of the balance of \$17,000, and all possible claimants of the trust corpus, either under the exercise of the power of appointment or under the settlor's Florida will.

The cause came up for decision below on four cross-motions for summary judgment. It will suffice to state that the defendants divide themselves into two contending groups. One group, which we will call the "Lewis Group", maintains that the trust agreement is invalid as an *inter vivos* trust instrument and that, accordingly, the exercise of the power of appointment was testamentary in character and, as such, ineffective under Florida law to pass any interest. The Lewis Group contends that the entire trust [fol. 238] corpus comprises part of the Florida estate of the settlor and passes under her will.

The second group, which we will call the "Hanson Group" maintains that the trust agreement is valid and that, accordingly, the transfer of \$417,000 pursuant to the exercise of the appointment is legally sufficient to pass title. Needless to say, the adoption of the contention of one group will benefit it financially to the loss of the other.

The Acting Vice Chancellor granted summary judgment in favor of the Hanson Group, holding that the trust agreement was a valid *inter vivos* trust; that the exercise of the

¹ Since its institution, she has been enjoined by the Florida court from prosecuting the action. Since that time, neither she nor her counsel has taken any part in the litigation.

power of appointment was effective to pass title to the \$417,000, and that there was no estoppel resulting from the Florida judgment. From this decision the Lewis Group appeals.

The facts are not in dispute. On March 25, 1935, Dora Browning Donner (hereafter Mrs. Donner), then being a resident of Pennsylvania, entered into a trust agreement with Wilmington Trust Company and deposited certain securities with it as the trust corpus. By the terms of the agreement Wilmington Trust Company was directed to manage, invest and reinvest the trust corpus and to pay over the net income to Mrs. Donner for her life who reserved to herself a power of appointment of the corpus exercisable either by instrument or by will. Failing the exercise of the power, the agreement directed that the trust corpus be distributed by the trustee at her death to her issue surviving, or to her next of kin.

[fol. 239] Specific powers were conferred upon Wilmington Trust Company, as trustee, which in substance were the ordinary powers granted to a trustee. However, it was specified that Wilmington Trust Company could exercise certain of the powers "only upon the written direction of, or with the written consent" of a trust advisor. These powers were (1) to sell trust assets, (2) to invest proceeds of sale of trust property, and (3) to participate in mergers and reorganizations of corporations whose securities were held as part of the trust assets.

In the agreement, Mrs. Donner designated a trust advisor and reserved the right to nominate other advisors at any time during her lifetime. She also reserved the right to amend, alter or revoke the agreement in whole or in part at any time, as well as the right to change from time to time the trustee. On one occasion, she withdrew \$75,000 from the trust corpus, which sum she later replaced.

On two different occasions prior to 1949, Mrs. Donner executed instruments exercising the power of appointment. Finally, on December 3, 1949,² by a non-testamentary instrument, she exercised the power of appointment, specifically revoking the earlier exercises by her of the power, and directing the Wilmington Trust Company, six months after her death, to pay over a total of \$17,000 to Bryn Mawr

² Later amended in a minor aspect.

[fol. 240] Hospital and certain family retainers, \$200,000 to Delaware Trust Company in trust for Joseph Donner Winsor, \$200,000 to Delaware Trust Company in trust for Donner Hanson, and the residue of the corpus to the executrix of her will.

In 1944, Mrs. Donner changed her residence from Pennsylvania to Palm Beach County, Florida where she was domiciled at her death in 1952. Her will was probated in Florida and Elizabeth Donner Hanson duly qualified as executrix. The residuary clause of her will directed her executrix to pay from the residuary estate, which specifically included the balance of the trust corpus not appointed in her lifetime, all death taxes on property appointed from the trust corpus during her lifetime, and to divide the balance remaining into two equal parts, one part to be transferred to Delaware Trust Company in trust for Katherine N. R. Denckla, a daughter; and the other part to be transferred to Elizabeth Donner Hanson in trust for Dorothy B. R. Stewart, another daughter, for her life, and upon her death to Delaware Trust Company in trust for Katherine Denckla.

At the death of Mrs. Donner the trust corpus held by Wilmington Trust Company amounted to in excess of \$1,490,000. Thereafter, pursuant to the directions contained in the exercise of the power of appointment Wilmington Trust Company distributed assets in the aggregate amount of \$417,000 and transferred a portion of the balance of the corpus to the executrix of the will of Mrs. Donner.

[fol. 241] In January, 1954 the two residuary beneficiaries under the will of Mrs. Donner³ brought an action for declaratory judgment in Palm Beach County, Florida against Mrs. Hanson, individually and as executrix, Wilmington Trust Company, Delaware Trust Company, and some of the other possible claimants to the assets passing under the residuary clause of the will of Mrs. Donner.⁴ In his action a judgment was sought determining what prop-

³ Katherine Denckla appeared in her own person. Dorothy Stewart appeared by a guardian.

⁴ Some of the family retainers, the recipients of a total of \$3,000.00 from the distribution pursuant to the exercise of the power of appointment, were not named as parties.

erty passed under the will of Mrs. Donner, and the authority of the executrix over the assets held by Wilmington Trust Company under the 1935 agreement.

Neither Wilmington Trust Company nor Delaware Trust Company were served personally in the Florida action, nor did either of them appear. None of the trust assets held by Wilmington Trust Company has ever been held or administered in Florida, nor has Wilmington Trust Company ever done business in the State of Florida.

On January 14, 1955 the Circuit Court of Palm Beach County, Florida entered a decree⁵ holding that it lacked [fol. 242] jurisdiction over the trust assets in Delaware and over Wilmington Trust Company, Delaware Trust Company and the other non-answering defendants, and directed that the complaint be dismissed without prejudice as to all of them. It was also held that no present interest passed to any beneficiary other than Mrs. Donner under the agreement of 1935 and that the exercise of the power of appointment by her was testamentary in character and, as such, invalid under Florida law because it was not subscribed by two witnesses. It was held, therefore, that the assets held by Wilmington Trust Company passed under the will of Mrs. Donner, and that the distribution thereof was to be made in accordance with the residuary clause.

Thereafter, an appeal was taken to the Supreme Court of Florida by the equivalent of the Hanson Group seeking a reversal of the holding of invalidity of the 1935 trust and the exercise of the power of appointment. Similarly, the equivalent of the Lewis Group by cross-appeal sought a reversal of the holding of lack of jurisdiction over Wilmington Trust Company and Delaware Trust Company.

The Supreme Court of Florida handed down its opinion (not yet reported) affirming that portion of the decree adjudging the invalidity of the trust and the exercise of the power of appointment, and reversing that portion of the decree holding that Florida had no jurisdiction over Wilmington Trust Company and Delaware Trust Company.

[fol. 243] In the interim, while the appeal was pending in Florida, the Lewis Group perfected its appeal in this court

⁵ The Florida decree was entered after the instituting of suit in Delaware by the executrix.

from the judgment of the Acting Vice Chancellor and argued it before us.

In the argument and on the briefs, the main emphasis was placed by the Lewis Group upon the estopping effect of the Florida judgment. In deciding this appeal, however, we think a more logical approach to what has now become a headlong jurisdictional collision between states is to consider first the question of what law governs the basic validity of the trust agreement and the exercise of the power of appointment, and whether or not under the applicable law the instruments are legally effective as such. We therefore take up first the question of essential validity of the trust and the exercise of the power of appointment.

There is no dispute concerning the pertinent facts. Wilmington Trust Company at all times has done business in Delaware. The trust agreement was executed in Delaware. The assets comprising the trust corpus were delivered to Wilmington Trust Company and retained by it in Delaware. The trust was administered wholly within Delaware. At the time the agreement was executed, Mrs. Donner was a resident of Pennsylvania.

In determining the situs of a trust for the purpose of deciding what law is applicable to determine its validity, the most important facts to be considered are the intention [fol. 244] of the creator of the trust, the domicile of the trustee, and the place in which the trust is administered. *Wilmington Trust Co. v. Wilmington Trust Co.*, 26 Del. Ch. 396, 24 A. 2d 309; *Wilmington Trust Co. v. Sloane*, 30 Del. Ch. 103, 54 A. 2d 544; *Annotation* 89 A.L.R. 1033.

Generally speaking, a creator of an *inter vivos* trust has some right of choice in the selection of the jurisdiction, the law of which will govern the administration of the trust. *Wilmington Trust Co. v. Wilmington Trust Co.*, supra. This trust agreement was signed and the securities delivered to a trustee doing business in Delaware. We think that this circumstance clearly indicates the intent of Mrs. Donner to have the trust administered and governed according to the law of Delaware. 1 *Beale, The Conflict of Laws*, 599.

Formerly, some courts emphasized the domicile of the settlor in deciding what law governed, but the more recent trend of decisions has placed considerably more emphasis on the location of the trust property and its place of ad-

ministration. *Land, Trust in the Conflict of Laws*, §23; 1A *Bogert, Trusts and Trustees*, §211, p. 327; *Restatement, Conflict of Laws*, §294(2). The manifest intention of Mrs. Donner to create a Delaware trust with a Delaware trustee, the deposit of the trust assets in Delaware, and the administration of the trust in Delaware, make it clear that the situs of the trust created by the agreement of 1935 is [fol. 245] Delaware, and that, therefore, its law determines its validity.

Not only is it the rule that the essential validity of an inter vivos trust having its situs in Delaware is governed by its law, but it is equally the rule that the validity of the exercise of a power of appointment reserved in such a trust agreement is to be determined in accordance with Delaware law. *Wilmington Trust Co. v. Wilmington Trust Co.*, supra; *Equitable Trust Co. v. Snader*, 17 Del. Ch. 203, 151 A. 712; *Land, Trusts in the Conflict of Laws*, §24. This is so because the appointments made by the exercise of the power are regarded in law as though they had been embodied in the original trust instrument, and as such as having been created by it. *Wilmington Trust Co. v. Wilmington Trust Co.*, supra.

We, therefore, hold that the law of Delaware determines the essential validity of this trust agreement and of the exercise of the power of appointment.

We now reach the question of whether or not this particular trust instrument and the exercise of the power reserved in it are valid under Delaware law.

The Lewis Group first argues that the agreement of 1935 created no present interest in remainder, either vested or contingent, in anyone prior to the death of Mrs. Donner, and that, therefore, it was a testamentary disposition and, as such, invalid for failure to comply with the Florida statutes concerning wills. In support of the argument are cited 3 *Scott on Trusts*, §330.4; 1 *Bogert on Trusts and Trustees*, [fol. 246] §103; and *Restatement, Trusts*, §56. We recognize the rule but we think that it does not apply to the trust created by Mrs. Donner in 1935.

By that agreement Mrs. Donner reserved a life interest to herself, and directed that upon her death the corpus should be distributed as directed by the exercise of a reserved power of appointment. In the event she should die

without having exercised the power it was directed that the corpus should be distributed to her then living issue, *per stirpes*, and in default of living issue, to her next of kin.

We think that a present interest in remainder came into existence with the creation of the trust in 1935. That remainder interest was lodged in Mrs. Donner's issue upon condition they survived her. By the same token, Mrs. Donner's next of kin had an interest in remainder conditioned upon Mrs. Donner dying without leaving surviving issue. It is true that both of these remainder interests—whether vested or contingent makes no difference—were subject to defeasance by the exercise of the reserved power of appointment. That, however, does not mean that they were not present interests created in 1935. *Gray, The Rule Against Perpetuities*, (4th Ed.), §112(3); *Restatement, Property, Future Interests*, §157, comment R. Furthermore, the exercise of the power of appointment by Mrs. Donner by instrument in her lifetime created present interests in the beneficiaries of the appointment, and under the rule of *Wilmington Trust Co. v. Wilmington Trust Co.*, [fol. 247] *supra*, those interests are regarded in law as having been embodied in the agreement of 1935. Accordingly, we are of the opinion that the trust is not testamentary in character for failure to create present interests in persons other than the settlor at the time it was created.

The Lewis Group next points to certain provisions of the trust agreement and contends that the effect of them is to destroy it as an effective *inter vivos* deed of trust. These provisions are: (1) The reservation by Mrs. Donner of all of the net income from the trust for her life; (2) The reservation by Mrs. Donner of the right to amend or revoke the trust agreement in whole or in part; (3) The reservation by Mrs. Donner of the right to change the trustee under the trust; (4) The reservation by Mrs. Donner of the right to designate and to change an investment advisor to the trustee; (5) The limitation placed upon the trustee to the effect that certain powers could be exercised only with the consent of or at the direction of the trust advisor, and (6) The reservation by Mrs. Donner of the power to appoint the trust corpus either by *inter vivos* instrument in writing, or by last will and testament.

The Lewis Group contends that cumulatively the above

recited provisions have the legal effect of creating an agency relationship between Mrs. Donner and Wilmington Trust Company. It is, therefore, argued that since the relationship was one of agency, the disposition of the trust corpus by Mrs. Donner through the purported exercise of her re-[fol. 248] served power of appointment was testamentary in character, and, as such, invalid under the law of Florida in which state she had died domiciled.

The Lewis Group cites authorities to the effect that if a settlor retains large powers of control over trust property and a power to change the ultimate beneficiaries of the trust to such an extent that the trust is made as ambulatory as a will, under some circumstances it will not be sustained as a trust, upon the theory that it is a disguised attempt by the settlor to make a revocable disposition of property to take effect after death. The question comes down to whether or not the combined effect of the reserved powers is such as to leave the settlor virtually the owner of the property and the trustee a mere agent. See *Annotation*, 32 ALR (2) 1270.

In Delaware it has long been the law that the reservation of a life interest in trust income coupled with a power to revoke the trust and to dispose of the trust corpus by testamentary appointment will not make the trust testamentary in character. *Equitable Trust v. Paschall*, 13 Del. Ch. 87, 115 A. 356. Nor will the reservation of a power to change the trustee at the option of the settlor make it testamentary. *Wilmington Trust Co. v. Wilmington Trust Co.*, *supra*.⁶ [fol. 249] However, the main thrust of the argument of the Lewis Group is directed to the provisions of the agreement providing for the designation of a trust advisor and the limitations on the power of the trustee to act only with the consent of or at the direction of the advisor.

⁶ This also seems to be the law in most jurisdictions. *United Bldg. & Loan Assn. v. Garrett* (1946, D.C. Ark.), 64 F.Supp. 460; *Rose v. Rose*, 300 Mich. 73, 1 N.W.2d 458; *Cleveland Tr. Co. v. White*, 134 Ohio State 1, 15 N.E.2d 627, 118 ALR 475; *Pickney v. City Bank Farmers Trust Co.*, 292 N.Y.S. 835; *Strause v. First Nat'l Bank of Ky.* (Ky.), 245 S.W.2d 914, 32 ALR 2d 126; *Leahy v. Old Colony Tr. Co.*, 326 Mass. 49, 93 N.E.2d 238, 18 ALR 2d 1006; *City Bank Farmers Tr. Co. v. Charity Organization Society*, 265 N.Y.S. 267; *Parkas v. Williams*, 5 Ill.2d 427, 125 N.E.2d 600; See 1 *Scott on Trusts*, §57.1.

By the agreement, Mrs. Donner reserved the right to change the original advisor named and, in fact, she did so on two separate occasions. The agreement, however, specifically confines the powers of the trust advisor as limitations on the exercise of the trustee's powers to (1) the power to sell trust property; (2) the power to invest the proceeds of any sale of trust property, and (3) the power to participate in any plan of merger or reorganization of any company in which trust proceeds have been invested. With respect to the exercise of all of the other specific powers granted to the trustee the consent of the trust advisor is not required.

If it be assumed that the exercise by the trustee of the above enumerated powers had been conditioned solely upon the consent of Mrs. Donner herself, it is clear that that [fol. 250] limitation would not have made the trust testamentary in character. *Restatement of Trusts*, §57, Comment g; 1 *Scott on Trusts*, §57.2; 1 *Bogert on Trusts and Trustees*, §104; *National Shawmut Bank of Boston v. Joy*, 315 Mass. 457, 53 N.E. 2d 113. It follows logically, therefore, that if Mrs. Donner could have limited the power of the trustee to act only with her consent without making the trust testamentary, the same limitation could have been imposed by requiring the consent of a third party. In point of fact, the *National Shawmut Bank* case was precisely that situation, the power to control the investing of the trust funds having been conferred upon a third person. Furthermore, a trust advisor is a fiduciary, somewhat in the nature of a co-trustee, and is sometimes described as a quasi-trustee. *Gathright v. Gaut*, 276 Ky. 562, 124 S.W.2d 782; *Restatement of Trusts*, §185, Comment c; 2 *Scott on Trusts*, §185. The resulting situation fundamentally is not unlike the appointment of co-trustees whose joint action is required in trust matters.

The agreement of 1935 by its terms reserves no power to Mrs. Donner herself over the control or management of the trust property, except such power as may come from her right to revoke the trust, change the trustee and change the advisor to the trustee. As far as the terms of the agreement itself are concerned, the trustee and the advisor were required to use their independent judgment in reaching decisions relating to the administration of the trust.

[fol. 251] The terms of the agreement, therefore, do not compel the conclusion that Mrs. Donner retained such a measure of control over the management of the trust property that, as a matter of law, the Wilmington Trust Company and the trust advisor named were actually her agents. The entire management of the trust is vested by the terms of the instrument in the trustee and the advisor. We think, therefore, that under the law of Delaware the agreement of 1935 created a valid *inter vivos* trust and not an agency relationship as the Lewis Group contends.

The Lewis Group, however, urges that the history of operation of the trust by Wilmington Trust Company indicates clearly that Wilmington Trust Company was in fact a mere agent. To support this contention, affidavits and depositions were filed upon the theory that the agreement, itself, was ambiguous, and that the history of operation of the trust would be of assistance in resolving the ambiguity.

Such extrinsic evidence is material only in the event of ambiguity in the trust instrument itself. *Restatement of Trusts*, §38. In our opinion, there is no ambiguity in this agreement. On the contrary, we think its provisions are clear with respect to the acts of Wilmington Trust Company which required the consent of the trust advisor. The scheme used in drafting the agreement was to enumerate specific powers granted to Wilmington Trust Company, as trustee. It was then specifically directed that certain, but not all, of [fol. 252] those powers should be exercised by Wilmington Trust Company only with the consent of or at the direction of the advisor of the trust. We think there is nothing ambiguous in this provision and that the requirement of consent of the trust advisor is confined to those specific powers. Consequently, we agree with the Acting Vice Chancellor that the evidence of the history of the trust administration is irrelevant.

In view, however, of the insistence of counsel upon the point, we will consider it, but we point out that in our opinion such consideration is unnecessary, and probably improper in the absence of an ambiguity in the instrument.

Generally speaking, the evidence discloses that Mrs. Donner named successively three different trust advisors, and that in administering the trust Wilmington Trust Company acted almost entirely in accordance with the directions

of the trust advisor. We will assume, as they appear to do, that the affidavits support the contention of the Lewis Group that Wilmington Trust Company in all details of trust administration accepted unhesitatingly the directions of the advisor, and in fact exercised no independent judgment.

We have no doubt, however, that the voluntary giving up by a trustee of its independent functions as trustee to an advisor named in the trust instrument cannot operate to change the fundamental nature of the relationship created [fol. 253] by the agreement. Such a voluntary failure to act as an independent trustee in those fields in which the agreement contemplated such action may be ground at the insistence of a beneficiary to remove the trustee but, certainly, it cannot change the relationship intended to be created by the trustor.

We note, also, that none of the facts supports at all the contention that Mrs. Donner, herself, had a hand in the management of the trust or made any of the decisions with respect to the internal management of the trust. Indeed, as far as the facts indicate, she knew nothing of the manner in which Wilmington Trust Company and the trust advisor were managing the affairs of the trust.

Assuming, therefore, that the evidence was material, a conclusion we expressly disclaim, nevertheless, there is no showing that Mrs. Donner retained any practical control of the management of the trust estate to the extent that the trustee and the trust advisor were thereby created her agents, with the consequence that, in law, the agreement of 1935 and the exercise of the power of appointment created by it were testamentary in character.

Our conclusion, therefore, is that the agreement of 1935 under the law of Delaware created a valid *inter vivos* trust. Under the law of Delaware, also, we think Wilmington Trust Company was required to transfer the trust assets pursuant to the directions contained in Mrs. Donner's exercise of the power of appointment delivered to it prior to her death.

[fol. 254] The Lewis Group cites principally in support of its argument in this respect *In re Pengelly's Estate*, 374 Pa. 358, 97 A. 2d 844. The case, however, is of little aid to them. It was a suit brought by a widow, estranged from

her husband for over forty years, to set aside a purported *inter vivos* trust which excluded her from any share in the husband's assets. The purported trust agreement transferred certain securities in trust and granted the trustee the right to invest trust assets "with the approval of the settlor during his lifetime." By the agreement the settlor reserved the income for life, and disposed of the corpus after his death in a manner to exclude his widow.

The court, in its opinion, states the fact to be that the trust agreement was in effect nothing more than the continuance of an arrangement for the management of the settlor's affairs existing between the trustee and the settlor for a period of seven years prior to the execution of the agreement, and that that arrangement was one of principal and agent. Thus, *Pengelly's Estate* dealt with a purported trust which in reality perpetuated a previously existing principal and agent relationship. This relationship was unchanged and continued to be completely subjected to the actual directions of the settlor in its administration. As we have pointed out, in the case before us, however, Mrs. Donner exercised no actual control whatsoever. The two cases are clearly different.

[fol. 255] We have been furnished a certified copy of the opinion of the Supreme Court of Florida in the litigation between some of the parties to this appeal. Later, we will have occasion to refer to this opinion under the point of collateral estoppel, but in connection with the question now under discussion we regard it merely as an additional authority cited by the Lewis Group.

The Florida Supreme Court held that the law of Florida governed the question of validity of the exercise of the power of appointment, because Mrs. Donner was domiciled in Florida at the time of her death. As we have pointed out, however, the domicile of a settlor is at most a minor factor to be considered in determining the situs of an *inter vivos* trust. As we read the opinion it appears to be the theory of the Florida Court that each exercise of the power of appointment was an amendment and republication of the agreement of 1935, and since no present remainder interest was created either by the agreement, or the exercise of the power, until the death of Mrs. Donner domiciled in

Florida, the validity of those remainder interests was to be tested by Florida law.

With all deference to the highest tribunal of a sister state, we disagree. Such may be the law of Florida but it is certainly not the law of Delaware. As we have pointed out, the exercise of a power of appointment creates immediate interests which in law are as though they had been written into the original instrument. The right to revoke or change [fol. 256] the appointment has merely the effect of making the interests thereby created subject to possible defeasance. Furthermore, we think the Florida Supreme Court, in concluding that no present interests in remainder were created by the agreement of 1935, has overlooked, presumably inadvertently, the gift in remainder to Mrs. Donner's living issue, or next of kin, in default of exercise of the power.

We are also constrained to disagree with the conclusion of the Florida Supreme Court that the agreement of 1935 created an agency relationship. The decision in this respect is based, apparently, solely upon the provisions of the agreement itself, reserving certain powers to Mrs. Donner and requiring in some instances joint action by the trustee and the advisor. As we have pointed out, the reservation of a power to revoke or appoint the corpus of an *inter vivos* trust does not transform the relationship into one of agency. Nor is there anything in the provisions relating to the trust advisor which suggests that the advisor was subject to the dictates of Mrs. Donner. Even the facts concerning the operation of the trust, which we suspect were not before the Florida court, rebut the violent presumption necessary to be made to support the conclusion reached. The opinion of the Florida Supreme Court is not persuasive as an authority.

We think our discussion of the validity of the agreement as an *inter vivos* trust is sufficient answer to other authorities relied upon by the Lewis Group in support of its [fol. 257] contentions under this point.

The second fundamental question is what effect, if any, does the adverse judgment entered in the Florida litigation have upon the right of the Hanson Group to litigate the question of essential validity of the trust of 1935 in Delaware.

The Florida judgment⁷ is an adjudication that by reason of the probate of Mrs. Donner's will, Florida, as the state of domiciliary administration, has substantive jurisdiction to inquire into the validity of the 1935 trust and the exercise of the powers of appointment, references to which were made in the will, and to hold them invalid under Florida law. Upon this point, the Supreme Court of Florida affirmed the trial court's ruling of invalidity. In the cross appeal, which sought a review of the trial court's holding that Florida lacked jurisdiction over the non-appearing defendants (among which were Wilmington Trust Company, Delaware Trust Company),⁸ the Florida Supreme Court reversed the trial court and held that jurisdiction over the trustee under the trust and the beneficiaries of the exercise of the power of appointment could be obtained by constructive service.

[fol. 258] In their answer the Lewis Group pleads the Florida judgment and upon the basis of it asks for certain relief. The first prayer for relief is that Delaware Trust Company be ordered to account for the \$400,000 received by it from the trustee and be directed to transfer it to the executrix of Mrs. Donner's will. The second prayer for relief is, in the event Delaware Trust Company not be ordered to account, that a money judgment be entered against Wilmington Trust Company in the amount of \$417,000 with interest.

With respect to the second prayer for relief, it is obvious that, irrespective of the demand that Delaware Trust Company be ordered to account, the Lewis Group seeks a personal judgment against Wilmington Trust Company from the inclusion in the prayer for a judgment of \$17,000, since Delaware Trust Company has never received this sum.

The Lewis Group, therefore, seeks to use the Florida judgment as the basis for an assertion of personal liability.

⁷ By stipulation of the parties the record has been augmented to include the Florida judgment as finally framed by the Supreme Court of Florida, to all intents and purposes as though it had been pleaded and proven in the court below.

⁸ The recipients of the \$17,000 appointment were not even named as parties *pro forma* in the Florida action.

against Wilmington Trust Company, and as a judgment *in rem* dispositive of the entire trust corpus. The full faith and credit clause of Article IV of the Federal Constitution is invoked.

The demand of full faith and credit for the Florida judgment as the prop for the assertion of personal liability against Wilmington Trust Company is defeated by the fact that Wilmington Trust Company has never been served personally with Florida process, nor has it appeared in any [fol. 259] form in the Florida litigation. The recital of these facts is sufficient to require the denial of full faith and credit to the Florida judgment when it is sought to be made the basis for the assertion of personal liability. *Iowa-Wisconsin Bridge Co. v. Phoenix Corp.*, 2 Terry 527, 25 A. 2d 383, cert. den. 317 U.S. 671. It follows, therefore, that the prayer of the Lewis Group for a money judgment against Wilmington Trust Company was properly denied.

Next, the Lewis Group argues that the Florida judgment is entitled to full faith and credit as a judgment *in rem*. It is, of course, true that the courts of Florida may adjudicate with respect to a *res* within its boundaries and subject to its control, and full faith and credit may be successfully claimed for such a judgment in the courts of other states. *Restatement, Conflict of Laws*, §429. But a judgment which has the force of a judgment *in rem* with respect to assets located in Florida does not acquire by reason of the full faith and credit clause any extra-territorial effect upon assets located outside of the State of Florida in the absence of seizure by the Florida courts. *Riley v. New York Trust Co.*, 315 U.S. 343, 62 S.Ct. 609. To have any extra-territorial effect such a judgment must have been rendered after the acquisition of personal jurisdiction over the party claiming the non-Florida assets. *Baker v. Baker, Eccles & Co.*, 242 U.S. 394, 37 S.Ct. 152.

The *res*, over which these parties are contending, consists [fol. 260] entirely of corporate securities which at all times since 1935 have been located in Delaware. There has been no seizure of them by any judicial process in Florida; nor has any person or corporation holding the assets voluntarily by appearance brought them before the Florida courts.

The Supreme Court of Florida purports to find jurisdiction over this trust *res* by reason of the Florida domicile of Mrs. Donner and the probate thereof of her will. In an action brought to construe that will it rendered a decision "as to whether or not the instruments which created their [remainder] interests were effective to shift the trust property out of the estate of the testatrix." This was done on the theory that the last effective act of Mrs. Donner to establish remainder interests in the trust corpus, i.e., the execution of the power of appointment of 1949, was performed by her while a resident of Florida and amounted to a republication of the trust of 1935; it was held that it was as if the original instrument had been executed while she was domiciled in Florida. As we have pointed out, this result is contrary to the law of Delaware, and also the recent trend of well considered decisions in other states.

The Florida court relies upon *Henderson v. Usher*, 118 Fla. 688, 160 S. 9, but as we read that case it does not support their holding. In the *Henderson* case an action was filed for the construction of the will of a Florida decedent which purported to exercise a power of appointment over [fol. 261] the corpus of an *inter vivos* trust created by a Florida resident in New York with a New York trustee. The donor deposited the securities comprising the trust corpus in New York, and in the instrument gave a power of appointment by will to the life beneficiary, a Florida resident. The will of the Florida donee of the power created an admittedly testamentary trust by the exercise of his power of appointment over the *inter vivos* trust corpus. Thereafter, the trustees of the testamentary trust, non-residents of Florida, instituted suit for the construction of the Florida will so that they might be instructed as to their duties under the will and the testamentary trust.

The precise question in the *Henderson* case was the validity of constructive service upon the widow of the testator, who had remarried and was a resident of New York. Constructive service upon her was upheld upon the ground that the *res* before the court was the Florida will, and the trust established by it, and since the trustees under the will had voluntarily submitted it to the courts of Florida for adjudication, jurisdiction had thereby been

conferred over the testamentary trust. Furthermore, there was no question but that the Florida will had by the exercise of the power created a Florida testamentary trust. In issue was the right of the widow to receive income from the testamentary trust. There was no issue concerning the rights of anyone arising out of the New York *inter vivos* trust.

[fol. 262] The *Henderson* case, therefore, is not authority for the assertion of jurisdiction by Florida over an *inter vivos* trust created and administered in Delaware. The will of Mrs. Donner, contrary to the apparent view of the Florida Supreme Court, did not exercise the reserved power of appointment. That power was exercised in 1949 and a part of the Delaware trust corpus was appointed to her Florida executrix and disposed of by the residuary clause of her will. With respect to this portion of the *inter vivos* trust corpus, it is clear that Florida has jurisdiction since it passes as part of Mrs. Donner's estate; but with respect to the \$417,000 appointed to non-Floridians it is equally clear, not only that Mrs. Donner did not intend it to pass as part of her estate, but that Florida has never had the remotest connection with or power over it.

The Florida Supreme Court cites as further authority for its assumption of jurisdiction over the 1935 trust the case of *Sweetland v. Sweetland*, 105 N.J. Eq. 608, 149 A. 50; aff. 107 N.J. Eq. 504, 153 A. 907. This case, however, is not authority for the assumption of jurisdiction under these circumstances. The *Sweetland* case was a bill for accounting against a non-resident trustee based on the dissipation and misappropriation of the corpus of an *inter vivos* trust created and administered in New York. The complainants sought an injunction against the New Jersey executors of the creator's New Jersey will, which added a large amount [fol. 263] to the original *inter vivos* trust corpus, from paying it over to the trustee, and sequestered the non-resident trustee's interest in the creator's New Jersey estate. Since the assets themselves were in the hands of New Jersey executors and had by sequestration been subjected to the power of the court, it was held that irrespective of the situs of the trust the court could enforce its decree to the extent of the property sequestered. It is plain that the *Sweetland* case is distinguishable.

It follows, therefore, that the Florida judgment is not entitled to full faith and credit as a judgment *in rem* as to the \$417,000 which has never been subjected to the control of the Florida court and, as such, a bar to the action before us.

The Lewis Group next argues that irrespective of full faith and credit, the Florida judgment precludes the litigation of the question of essential validity of the 1935 trust as a matter of *res adjudicata* or, in the alternative, as a matter of collateral estoppel.

The doctrine of *res adjudicata* has no application in the pending action because the essence of the doctrine is that the prior judgment raised as a bar must have been rendered in a prior action between the same parties involving the same cause of action asserted in the second action. *Restatement, Judgments*, §48; *Collateral Estoppel by Judgment*, 56 Harv. L.R. 1. It is obvious that we are dealing here with an entirely different cause of action from that tried in [fol. 264] Florida. In Florida the issue was, what assets passed under the will of Mrs. Donner? The Florida ruling, that the exercise of the power of appointment was testamentary, was an implicit ruling of invalidity of the 1935 agreement as an *inter vivos* trust, but it was only incidental to the main issue raised in the Florida proceeding.

This fact is sufficient answer to the assertion of the defense of *res adjudicata*, but it would seem to be clear that it could not be availed of in any event because of the inherent lack of jurisdiction of the Florida courts over some of the parties to this cause and over the subject matter of this suit.

The Lewis Group argues, in the alternative, that the Hanson Group; however, are collaterally estopped by the Florida judgment from relitigating the question of essential validity of the 1935 agreement as an *inter vivos* trust. The doctrine of collateral estoppel is recognized and applied in proper cases by Delaware courts. *Petrucchi v. Landon*, 9 Terry 491, 107 A. 2d 236; *Niles v. Niles* (Del. Ch.), 111 A. 2d 697.

Florida in a direct proceeding would have had no jurisdiction to determine the validity of an *inter vivos* trust whose situs was in Delaware and whose trustee was not

subject to Florida process. 54 *Am. Jur., Trusts*, §564, §584; *Lines v. Lines*, 142 Pa. 149, 21 A. 809. It may, however, occur that in an action in Florida over which Florida admittedly has jurisdiction it might become necessary for [fol. 265] the Florida court to decide a question which it would have had no jurisdiction over in a direct proceeding brought for that purpose. In such event, when such question has actually been litigated and fought out by the same parties in the prior action, a collateral estoppel may sometimes be raised against such parties in a second action in which the same issue is raised. We are of the opinion, however, that no collateral estoppel arises in the pending case.

In the first place, a recognized exception to the doctrine exists when the second action is brought in a court having jurisdiction of the subject matter and parties to determine directly the issue decided only incidentally in the first action. *Restatement, Judgments*, §71; *Collateral Estoppel by Judgment*, 56 Harv. L.R. 1, 22; *Annotation*, 147 A.L.R. 225. The action before us was brought in the Court of Chancery to determine directly the validity of the 1935 agreement as an *inter vivos* trust and that court has jurisdiction of the subject matter and the necessary parties. Since the holding of invalidity by the Florida courts was only incidental to the main issue presented to it, the case falls directly within the exception to the doctrine.

In the second place, the doctrine of collateral estoppel is applied only when the same parties in the second action have had their day in court in the first action on the issue in question. This rule is based on the consideration that the proper administration of justice will be served best [fol. 266] by limiting parties to one trial of one issue. See *Niles v. Niles*, *supra*.

The Florida judgment does not meet this condition, for the Delaware trustee and the beneficiaries of the exercise of the power have never had their day in court on this issue.

It does not answer this objection to argue, as the Lewis Group does, that these parties received notice of the pendency of the Florida action and could have appeared in that forum and defended the action. To be sure, they could have done so, but they elected not to, for there was no *res*

before the Florida court the seizure of which would have furnished a compulsive force for their appearance. To hold that in the absence of jurisdiction over the *res* in controversy Florida can compel appearance through substituted service would be a violation of the due process clause of the 14th Amendment. *Pennoyer v. Neff*, 95 U.S. 714, 24 S.Ct. 565.

The Lewis Group argues, however, that Wilmington Trust Company and Delaware Trust Company are bound by the Florida judgment to all intents and purposes as though they had appeared in the cause because the various beneficiaries of the trusts were subject to the jurisdiction of the Florida court.⁹ The argument is that when a *cestui que trust* is bound by the judgment of a court, the trustee [fol. 267] is likewise bound because he is in privity with the *cestui*. It is argued that these particular trustees were mere stakeholders and, as such, were unnecessary parties to the Florida action. *Thompson v. Hammond*, (N.Y.) 1 Edw. Ch. 497, and *First National Bank v. Ickes*, 60 F. Supp. 366, are cited in support of the argument. We have read these cases and are of the opinion that they do not remotely support the contention.

Furthermore, we think it the law that while a *cestui que trust* is bound in most circumstances by an adjudication against his trustee, *Iowa-Wisconsin Bridge v. Phoenix Corp.*, supra, the converse of that proposition is not the law, particularly when the adjudication affects the existence of the trust itself. It is the duty of a trustee to defend the existence of his trust, 2 *Scott on Trusts*, §178, even against an attempt by the settlor and sole beneficiary to overthrow it. Cf. *Weymouth v. Delaware Trust Co.*, 29 Del. Ch. 1, 45 A. 2d 427. A trustee is also an indispensable party to a suit involving the trust property, and in defense of title to the trust property. 54 *Am. Jur., Trusts*, §584.

In view of this, it is impossible to accept on principle the argument that a judgment against a *cestui que trust* binds the non-appearing trustee. At the argument, counsel for both groups stated that they had found no authority

⁹ No similar argument is made with respect to the recipients of the \$17,000 appointment.

so holding, nor have our own researches disclosed any. Upon reflection, we are not surprised that there is none, for any such rule might permit a beneficiary by shopping [fol. 268] around among jurisdictions to defeat the trust against the manifest intent of the trustor. We, therefore, are of the opinion that the non-appearing defendants in Florida are not estopped by the judgment on the ground of privity with appearing defendants.

Finally, we think the public policy of Delaware precludes its courts from giving any effect at all to the Florida judgment of invalidity of the 1935 trust. We are dealing with a Delaware trust. The trust *res* and trustee are located in Delaware. The entire administration of the trust has been in Delaware. The attack on the validity of this trust raises a question of first impression in Delaware and one of great importance in our law of trusts. To give effect to the Florida judgment would be to permit a sister state to subject a Delaware trust and a Delaware trustee to a rule of law diametrically opposed to the Delaware law. It is our duty to apply Delaware law to controversies involving property located in Delaware, and not to relinquish that duty to the courts of a state having at best only a shadowy pretense of jurisdiction. Cf. *Taylor v. Crosson*, 11 Del. Ch. 145, 98 A. 375.

We conclude, therefore, that the agreement of 1935 between Mrs. Donner and Wilmington Trust Company created a valid *inter vivos* trust, that the exercise by Mrs. Donner of the power of appointment reserved in that agreement was effective to dispose of the trust corpus, and that the parties to this cause are not estopped by the Florida [fol. 269] judgment from having those questions adjudicated by the Delaware Court of Chancery.

The judgment of the Court of Chancery will be affirmed.

[fol. 270] IN THE SUPREME COURT OF THE STATE OF DELAWARE

[Title omitted]

PETITION FOR RE-ARGUMENT OR IN THE ALTERNATIVE, A
PETITION FOR STAY OF MANDATE—January 25, 1957

DORA STEWART LEWIS, MARY WASHINGTON STEWART BORIE and PAULA BROWNING DENCKLA, by their attorneys, Arthur G. Logan and Aubrey B. Lank, respectfully petition this Court for re-argument of the above cause or in the alternative, that the mandate of this Court be stayed for a period of ninety (90) days to permit an application for a writ of certiorari to be made to the Supreme Court of the United States. As grounds for the petition for re-argument, your petitioners respectfully say:

[fol. 271] 1. That this Court failed to give full faith and credit to the judgment of the Supreme Court of the State of Florida under Article 4, Section 1 of the Constitution of the United States.

"The general rule is that a judgment rendered by a court of one state, authenticated as by law provided, is, under the full faith and credit clause of the United States Constitution, entitled, in the courts of another state of the Union, to force, effect, and full faith and credit, such as it has by law or usage in the courts of the state where the adjudication was had." 31 Am. Jur., Judgments §533, p. 141-142. See: *Roche v. McDonald*, 275 U. S. 449, 72 L. Ed. 365, 48 S. Ct. 142.

2. This Court erroneously reviewed the judgment of the Supreme Court of the State of Florida as though it was a higher Court sitting in the State of Florida. See: *Roche v. McDonald*, *supra*.

3. This Court failed to look into the constitutional and statutory jurisdiction of the Circuit Court for Palm Beach County, Florida, wherein the Florida action was commenced on January 14, 1955. See: *State ex. rel. B. F. Goodrich v. Trammell*, 140 Fla. 500, 192 So. 175; Florida Statutes Annotated, Constitution Article 5, Section 11.

4. This Court erroneously permitted a collateral attack on the judgment of the Supreme Court of the State of [fol. 272] Florida, which collateral attack would not have been permitted by the Courts of the State of Florida. *Coral Realty Co., et al., v. Peacock Holding Co., et al.*, 103 Fla. 916, 138 So. 622. See also, *Smith v. Urquhart*, 129 Fla. 742, 176 So. 787.

5. In applying the full faith and credit clause as to the doctrine of res judicata, this Court failed to apply the law of Florida. In Florida, identity of relief sought is not essential for the application of the doctrine of res judicata. *Murphy v. Murphy*, 151 Fla. 370, 10 So. (2d) 136.

6. This Court erred in holding that the Florida action and the instant action are separate and distinct causes of action. Both actions were and are for declaratory decrees to determine where the funds involved should properly go.

7. In considering the doctrine of res judicata and collateral estoppel, this Court failed to apply the doctrine of virtual representation which has been accepted by the State of Florida. See comments in *Ottensosen v. Scott*, 47 Fla. 276, 37 So. 161.

8. This Court erroneously decided that the parties to this action are not bound in any manner whatsoever by the Florida judgment by virtue of the lack of jurisdiction of the Florida Court over the subject matter of this action.

9. The Circuit Court in and for Palm Beach County had full authority and jurisdiction to decide what passed under [fol. 273] the Will of Dora Browning Donner. *Wilmington Trust Company v. Wilmington Trust Company*, 26 Del. Ch. 397, 24 A. (2d) 309. See also Florida Statutes Annotated, Constitution Article 5, Section 11. Incidental to the determination of this question was the decision as to the validity of the so-called agreement of trust dated March 25, 1935. The Circuit Court in and for Palm Beach County determined that the said trust was invalid and upon appeal to the Supreme Court of the State of Florida, the action of the Florida trial court was affirmed as to the invalidity of the trust and reversed as to the lack of jurisdiction over the non-

appearing parties. The Court held, properly so, that the res of which it had jurisdiction was the will of the testator who died domiciled in the State of Florida.

10. This Court erroneously held that the so-called agreement of trust dated March 25, 1935, wherein Dora Browning Donner was trustor and the Wilmington Trust Company, trustee, was a valid trust where no present interests were created. *Restatement of the Law of Trust* §56, 3 *Scott on Trusts* §330.4, 1 *Bogert on Trusts and Trustees* §103.

11. This Court erroneously held that the reserved power of control under the agreement dated March 25, 1935, did not so limit the trustee in the performance of his duties so as to constitute the agreement of trust, an agency or depository agreement.

[fol. 274] 12. This Court erroneously held that the so-called trust agreement survived the death of the trustor.

Wherefore, your petitioners pray:

(a) That they be granted a re-argument in the above cause.

(b) That in the alternative this Court stay its mandate for a period of ninety (90) days to permit your petitioners to apply for a writ of certiorari to the Supreme Court of the United States.

Respectfully submitted, /s/ Arthur G. Logan ABE,
/s/ Aubrey B. Lank, Attorneys for Dora Stewart
Lewis, Mary Washington Stewart Borie and Paula
Browning Denekla, 400 Continental American
Bldg., Wilmington, Delaware.

[fol. 275] IN THE SUPREME COURT OF THE STATE OF DELAWARE.

No. 8, 1956.

Appeal from the Court of Chancery of the State of Delaware
in and for New Castle County, Civil Action No. 531.

DORA STEWART LEWIS, MARY WASHINGTON STEWART BORIE
and PAULA BROWNING DENCKLA, Defendants Below,
Appellants,

v.

ELIZABETH DONNER HANSON, as Executrix and Trustee under
the Last Will of Dora Browning Donner, deceased,
Plaintiff Below; Appellee,

WILMINGTON TRUST COMPANY, a Delaware corporation, as
Trustee under three separate Agreements, (1) and (2)
with William H. Donner dated March 18, 1932 and March
19, 1932, and (3) with Dora Browning Donner, dated
March 25, 1935, et al., Defendants Below, Appellees.

ORDER STAYING MANDATE—February 7, 1957.

And Now, To Wit: this 7th day of February, A. D. 1957,
the petition of Dora Stewart Lewis, Mary Washington
Stewart Borie and Paula Browning Denckla for re-argu-
ment having come on to be heard, and the same having been
duly considered, it is

Ordered, Adjudged and Decreed:

That the same be and hereby is denied, and it is

Further Ordered, Adjudged and Decreed:

That the mandate of this Court shall be stayed for a
[fol. 276] period of ninety (90) days from the date hereof
to permit the said Dora Stewart Lewis, Mary Washington
Stewart Borie and Paula Browning Denckla to apply to
the Supreme Court of the United States for a writ of cer-
tiorari, and, if such application be made within said period,

the mandate of this Court shall be stayed until the final order of the Supreme Court of the United States.

/s/ Daniel F. Wolcott, Justice; /s/ Howard W. Bramhall, Justice; /s/ James B. Carey, Justice.

Approved as to Form:

/s/ Edwin D. Steel, Jr., DuPont Building, Wilmington, Delaware, Guardian ad litem for Joseph Donner Winsor, Curtin Winsor, Jr., and Donner Hanson;

/s/ C. S. Laaton, DuPont Building, Wilmington, Delaware, Attorney for Wilmington Trust Co., Trustee;

/s/ R. F. Walls, Jr., Industrial Trust Building, Wilmington, Delaware, Guardian ad litem for Dorothy B. R. Stewart, et al.;

/s/ David F. Anderson, Delaware Trust Building, Wilmington, Delaware, Attorney for Delaware Trust Co., Trustee;

/s/ Aubrey B. Lank, Continental American Building, Wilmington, Delaware, Attorney for Dora Stewart Lewis, et al.

[fol. 276] IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1956

No. 977

DORA STEWART LEWIS, et al., Petitioners,

v.

ELIZABETH DONNER HANSON, et al., Respondents.

STIPULATION OF THE PARTIES THAT THERE BE INCLUDED IN THE PRINTED RECORD IN THE SUPREME COURT OF THE UNITED STATES CERTAIN ADDITIONAL CERTIFIED PORTIONS OF THE RECORD BELOW—Filed July 12, 1957

It Is Hereby Stipulated and Agreed by and between petitioners and respondents, in the above-entitled case that

at the request of Edwin D. Steel, Jr., Esquire, guardian ad litem of Joseph Donner Winsor, Curtin Winsor, Jr. and Donner Hanson, there should be included in the printed record in the Supreme Court of the United States additional certified portions of the record below before the Court of Chancery of the State of Delaware in and for New Castle County which constituted a portion of the record in the Supreme Court of Delaware in the case entitled Dora Stewart Lewis, et al. v. Elizabeth Donner Hanson, et al., being No. 8, 1956 on the dockets of that Court, which additional portions of the record are hereinafter enumerated and physically annexed to this stipulation:

1. Affidavit of Paul D. Lovett dated November 12, 1954 (including Exhibits A, B and C) annexed to the "Motion for Summary Judgment" of Edwin D. Steel, Jr., Guardian ad litem, etc., filed in the Court of Chancery of the State of [fol. 277] Delaware in and for New Castle County on November 18, 1954.

2. Affidavit of George Ainslie Goad dated November 10, 1954 (excluding exhibits) annexed to the "Motion for Summary Judgment" of Edwin D. Steel, Jr., Guardian ad litem, etc., filed in the Court of Chancery of the State of Delaware in and for New Castle County on November 18, 1954.

3. Affidavit of C. Kenneth Baxter dated November 12, 1954, paragraphs 10, 11 and 12, annexed to the "Motion for Summary Judgment" of Edwin D. Steel, Jr., Guardian ad litem, etc., filed in the Court of Chancery of the State of Delaware in and for New Castle County on November 18, 1954. [Paragraphs 1-9 of this Affidavit have heretofore been designated by Petitioners to be included in the printed record and appear at pages A110-A113 of the printed Appendix of Petitioners as the same was filed in the Supreme Court of the State of Delaware.]

4. Proceedings in the Court of Chancery of the State of Delaware in and for New Castle County in the case entitled "In the matter of Dorothy B. R. Stewart, an insane person" including (1) petition of Elwyn L. Middleton, verified March 18, 1953 (having annexed thereto copies of proceedings in The Court of the County Judge in and for Palm

Beach County, Florida "In the matter of the Guardianship of Dorothy B. R. Stewart, an incompetent" being No. 8293 on the dockets of said court, Letters of Guardianship granted to Elwyn L. Middleton therein, Letters of Discharge of E. Harris Drew therein), (2) the certification of the Register in Chancery in and for New Castle County showing that such proceedings of the Court of the County Judge [fol. 278] ~~in~~ and for Palm Beach County, Florida, are on file in the Office of the Register in Chancery in and for New Castle County, State of Delaware, and (3) the order of The Honorable Collins J. Seitz, Chancellor, entered thereon on November 27, 1953 and the Certification of the Register in Chancery in and for New Castle County, Delaware, annexed thereto filed in the Court of Chancery of the State of Delaware in and for New Castle County on November 10, 1955. [Not to be included in the printed record in the Supreme Court of the United States are the seven (7) photostatic copies of pages comprising "Final Return of E. Harris Drew, Guardian of the Property of Dorothy B. R. Stewart, covering the period from June 25, 1952 to December 12, 1952" as the same are a part of the proceedings aforesaid in The Court of the County Judge in and for Palm Beach County, Florida.]

5. Affidavit of Paul D. Lovett dated October 24, 1955 and Affidavit of C. Kenneth Baxter dated October 24, 1955 filed in the Court of Chancery of the State of Delaware in and for New Castle County on October 26, 1955.

Dated: July 8, 1957

Arthur G. Logan, Attorney for Dora Stewart Lewis,
Mary Washington Stewart Borie, Paula Browning
Denckla, Petitioners.

Edwin D. Steel, Jr., Guardian ad litem for Joseph
Donner Winsor, Curtin Winsor, Jr. and Donner
Hanson, Respondent.

R. B. Walls, Jr., Guardian ad litem for Dorothy B. R.
Stewart and William Donner Denckla, Respondent.

C. S. Layton, Attorney for Wilmington Trust Com-
pany, Respondent.

David F. Anderson, Attorney for Delaware Trust
Company, Respondent.

[fol. 279] ATTACHMENT TO STIPULATION

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

Civil Action No. 531

ELIZABETH DONNER HANSON, as Executrix and Trustee under the Last Will of Dora Browning Donner, deceased,
Plaintiff,

v.

WILMINGTON TRUST COMPANY, et al., Defendants.

STATE OF DELAWARE,
NEW CASTLE COUNTY, ss.:

Be It Remembered that on this 12th day of November, 1954, personally appeared before me the undersigned, a Notary Public of the State and County aforesaid, Paul D. Lovett, who being by me duly sworn did depose and say:

1. That he is a vice-president and in charge of the Trust Department of Delaware Trust Company, and at all times hereinafter referred to has been an officer in said Trust Department.

2. That on November 26, 1948, a Trust Agreement was entered into between Elizabeth Donner Hanson and Delaware Trust Company as Trustee for the benefit of Donner Hanson and others, and on the same date a Trust Agreement was entered into between Delaware Trust Company as Trustee and Elizabeth Donner Hanson for the benefit of Joseph Donner Winsor and others, and that at all times since November 26, 1948 the trusts have been in full force and effect and have been administered by the Delaware Trust Company as Trustee. A true and correct copy of each [fol. 280] of the trust agreements is attached hereto and marked Exhibits A and B respectively.

3. That Delaware Trust Company is Successor Trustee under an agreement dated August 6, 1940 (No. 8555) for the benefit of Katherine N. R. Denckla Ordway and others. A true and correct copy of the agreement dated August 6,

1940 together with the following writings relating thereto are hereto attached and marked collectively as Exhibit C:

Letter dated October 11, 1940 from Robert N. Donner, John Stewart and Dora Donner Ide to Montreal Trust Company

Deed of conveyance of additional securities dated June 20, 1941 from W. H. Donner to Montreal Trust Company, trustee under agreement dated August 6, 1940

Letter dated June 23, 1941 from Donner Estates, Inc., to Montreal Trust Company

Letter dated June 23, 1941 from Donner Estates, Inc., to Delaware Trust Company

Letter dated June 23, 1941 from Donner Estates, Inc., to Delaware Trust Company

Letter dated June 26, 1941 from Delaware Trust Company to Donner Estates, Inc.

Letter dated June 26, 1941 from Delaware Trust Company to Montreal Trust Company

4. The assets held by the Delaware Trust Company as trustee under the two trusts referred to in paragraph 2 hereof have been located exclusively within the State of Delaware at all times since the inception of such trusts, and the assets held by the Delaware Trust Company as trustee under the trust referred to in paragraph 3 hereof have been located exclusively within the State of Delaware at all times since such assets were received by the Delaware Trust Company shortly after its appointment as Successor Trustee.

[fol. 281] 5. The Trustee has no office or other place of business outside of the State of Delaware, and all of its duties as Trustee under the three aforementioned trusts have been performed within the State of Delaware.

6. That on or about March 30, 1953, Wilmington Trust Company, as Trustee under an agreement dated March 25, 1935 between itself and Dora Browning Donner, transferred securities and cash having an aggregate value of \$200,000, to the Delaware Trust Company as Trustee under agreement dated November 26, 1948 with Elizabeth Donner Hanson for Donner Hanson and others (Exhibit A hereto); and

on or about the same date the Wilmington Trust Company, Trustee as aforesaid, transferred securities and cash having an aggregate value of \$200,000 to the Delaware Trust Company as Trustee under agreement dated November 26, 1948 with Elizabeth Donner Hanson for Joseph Donner Winsor and others (Exhibit B hereto). That at the time when such transfers were effected and the securities and cash were received by the Delaware Trust Company, it had no knowledge of any kind that an attack had been or would be made by anybody upon the validity or effectiveness of the Trust Agreement dated March 25, 1935 between Dora Browning Donner and Wilmington Trust Company, as Trustee, or the exercises of the power of appointment by Dora Browning Donner thereunder.

Paul D. Lovett

Sworn to and subscribed before me the day and year first above written.

Lindsay Greenplate, Notary Public.

[fol. 282]

EXHIBIT A TO AFFIDAVIT

THIS AGREEMENT, made this twenty-sixth day of November A.D. 1948, between ELIZABETH DONNER HANSON, of Palm Beach, Florida, party of the first part, hereinafter called "Trustor" and DELAWARE TRUST COMPANY, a corporation of the State of Delaware, party of the second part, hereinafter called "Trustee".

WITNESSETH

WHEREAS, the Trustor desires to establish a trust of certain securities and property described in Schedule "A" annexed hereto and made a part hereof, which securities and property together with the investments, reinvestments, and proceeds thereof, and such other securities and property as hereafter may be received by the Trustee hereunder, are hereinafter called the trust fund.

NOW, THEREFORE, in consideration of the premises, the mutual covenants hereinafter set forth and the sum of One

Dollar by the Trustee to the Trustor in hand paid, the receipt whereof is hereby acknowledged, the Trustor has assigned, transferred, and delivered and by these presents does assign, transfer, and deliver the securities and property described in said Schedule "A" unto the Trustee and its successors, IN TRUST, NEVERTHELESS, for the following uses, intents and purposes; that is to say:—

1. The Trustee shall hold, manage, invest, and reinvest the trust fund, collect the income thereof, and after paying out of such income all taxes, charges, and expenses payable thereout, including compensation to the Trustee as hereinafter provided, shall until DONNER HANSON, son of the Trustor, attains the age of twenty-five (25) years use such income or so much thereof as in its discretion may be considered advisable but with the consent and approval of the Advisor or Advisors (if there be Advisors or an Advisor then acting) for the support, maintenance, and education [fol. 283] of the said DONNER HANSON, accumulating and adding to the capital of the trust fund any income not so applied until the said DONNER HANSON attains the age of twenty-five (25) years.

2. When the said DONNER HANSON attains the age of twenty-five (25) years, the Trustee shall pay and deliver to him one-fourth ($\frac{1}{4}$) of the capital of the trust fund as it then is and thereafter shall pay to him the net income derived from the remainder of the trust fund during the remainder of his lifetime.

3. Upon the death of the said DONNER HANSON, the Trustee shall hold the capital of the remaining trust fund for his issue or the issue of the Trustor or some one or more of them in such shares and proportions as the said DONNER HANSON may either by instrument in writing executed by him during his lifetime and filed with the Trustee or by his last Will and Testament direct and appoint. In default of such direction by the said DONNER HANSON or so far as it shall be void or shall not extend or take effect, the remainder of the trust fund shall be divided in equal shares per stirpes among the issue of the said DONNER HANSON alive at the time of his death. If no issue of the said DONNER HANSON shall survive him, then the capital of the remainder of the

trust fund shall be divided in equal shares among the other children of Trustor alive at the time of his death with representation in favor of the issue of any such other child who may then be dead and have left issue then alive and in the event of there being no such other child or children or their descendants then living, then the capital of the remainder of the trust fund shall be paid to the next of kin of the Trustor in accordance with the intestate laws of the State of Delaware then in force, and as if the Trustor had died intestate immediately after the death of the said DONNER HANSON.

4. No person being or claiming to be a child of ROBERT [fol. 28+] NEWSOM DONNER, (brother of the Trustor) born before the eighth (8th) day of January, 1924, or a descendant of any such person, shall be included in the foregoing purposes as a next of kin of the Trustor.

5. The expression "descendants of the Trustor" wherever used in this agreement shall include adopted children of the Trustor and their descendants.

6. All the benefits conferred upon the beneficiaries hereunder are given upon the express condition that they shall at all times be exempt from seizure or attachment and further that so long as any portion of the trust fund or the revenue therefrom is in the possession of the Trustee it shall be incapable of being assigned by any beneficiary in favor of any person other than the issue of such beneficiary or the descendants of the Trustor but this shall not in any way effect the powers hereinafter conferred on the Trustee. None of the property hereby given shall either in capital or in revenue fall into or form part of any community of property which may subsist between such beneficiary and his or her consort and the share of any female beneficiary shall be paid to her on her own receipt without the written authorization or consent of her husband being required.

GENERAL POWERS GRANTED TO TRUSTEE

7. Subject to the provisions and limitations herein expressly set forth, the Trustee shall have in general, the power to do and perform any and all acts and things in

relation to the Trust Fund in the same manner and to the same extent as an individual might or could do with respect to his own property. No enumeration of specific powers herein made shall be construed as a limitation on the foregoing general power, nor shall any of the powers herein conferred upon the Trustee be exhausted by the use thereof, but each shall be continuing.

[fol. 285] (a) The Trustee is specifically authorized and empowered:

(1) To retain any and all stocks, bonds, notes, securities and/or other property constituting the original trust fund or added thereto without liability on the part of the Trustee for any decreases in the value thereof.

(2) To determine whether expenses and other disbursement shall be charged against principal or income or partly against principal and partly against income and such determinations shall be conclusive and binding upon all persons and corporations interested therein.

(3) To take and to hold any security or other property constituting a part of the trust fund, in bearer form or in its own name or in the name of its nominee or nominees, without disclosing its fiduciary capacity and the Trustee's liability shall be neither increased nor decreased thereby.

(4) To make any division or distribution of the trust fund herein provided for in cash or in kind, or partly in cash and partly in kind and to value and apportion the property to be so divided or distributed, which valuation and apportionment shall be final and conclusive upon all persons and corporations interested therein.

(b) Subject to the direction in writing of the Advisor or Advisors hereinafter named or their successor or successors as such Advisor, the Trustee is also specifically authorized and empowered:

(1) To sell at public or private sale, exchange for like or unlike property, convey, lease for terms longer or shorter than the trust and otherwise dispose of any and all property, real or personal, held in the trust fund for such price and upon such terms and credits as the Trustee may deem proper.

[fol. 286] (2) To invest the proceeds of any such sale or sales or any other money available for investment in such stocks, bonds, notes, securities and/or other property as may be deemed appropriate for this trust fund, irrespective of the rules of investment applying to trusts under any present or future laws of the State of Delaware or elsewhere, or to retain uninvested the proceeds of any such sale or any other money available for investment for such period of time as may be deemed to the best interest of the trust estate.

(3) To vote directly or by proxy at any election or stockholders' meeting any shares of stock held hereunder.

(4) To participate in any plan or proceeding for protecting or enforcing any right, obligation or interest arising from any stock, bond, note or security held in the trust fund or for reorganizing, consolidating, merging or adjusting the finances of any corporation issuing the same, to accept in lieu thereof any new or substituted stocks, bonds, notes and/or securities, whether of the same or a different kind or class or with different priorities, rights or privileges, to pay any assessment or any expense incident thereto and to do any other act or thing that the Trustee may deem necessary or advisable in connection therewith.

(c) If at any time during the continuance of this trust there shall be no Advisor of the trust, or if the Advisor of the trust shall fail to give any written direction or to communicate in writing to the Trustee, his or her approval or disapproval as to the exercise of any of the aforesaid powers contained in paragraph (b), within 30 days after the Trustee shall have sent to the Advisor, by registered mail, at his or her last known address, a written request for such consent, the Trustee is hereby authorized and empowered to take such action in the premises as it, in its sole discretion, shall deem to be for the best interest of the trust estate.

8. The Trustor and/or any other person may at any time and from time to time add to the trust fund by assigning, [fol. 287] transferring, conveying, delivering or making

POWERS RESERVED TO THE TRUSTOR

payable to the Trustee cash, securities and/or other property; and all such cash, securities and other property shall be held by the Trustee subject to the terms of this trust.

9. The Trustor nominates, constitutes and appoints THE DONNER CORPORATION, a Pennsylvania corporation, to be the Advisor of this trust, and reserves the right at any time and from time to time by written notice to the Trustee, to nominate additional, alternative and/or succeeding Advisor or Advisors of the trust, to revoke any such nomination and/or to remove any existing Advisor or Advisors of the trust. Any additional alternative and/or succeeding Advisor or Advisors may be a person, firm, association and/or corporation. Any such nomination, revocation or removal shall become effective at the time or times and upon the happening of the event or events and subject to such conditions specified in such nomination, revocation or removal. Any such nomination may provide that the Advisor or Advisors so appointed shall be paid by the Trustee a reasonable fee in any amount to be agreed upon by the Trustee and the said Advisor or Advisors, not to exceed four per cent of the gross income of the trust fund in any year, in compensation of his or their services and the expenses as Advisor or Advisors of the trust; provided, however, that so long as THE DONNER CORPORATION, a Pennsylvania Corporation, is serving as the Advisor of the Trust, the annual compensation for its services as such Advisor shall be One Hundred Twenty-five Dollars (\$125.00) for each One Hundred Thousand Dollars (\$100,000.00) of asset value in the Trust and the asset value for this purpose shall be determined to be the mean between the reasonable asset value on the first day of January and the last day of December of each year. In calculating the compensation on asset value so determined the minimum fee shall be One Hundred Twenty-five Dollars (\$125.00) per annum and whenever the asset value on such valuation dates exceeds One Hundred Thousand Dollars (\$100,000.00), the excess over units of One Hundred Thousand Dollars (\$100,000.00) if less than Fifty Thousand Dollars (\$50,000.00) shall be disregarded, and if more than Fifty Thousand Dollars [fol. 288] (\$50,000.00), be regarded as a full unit of One Hundred Thousand Dollars (\$100,000.00). Said compensa-

tion shall be paid out of the income of the Trust in quarterly instalments on the tenth (10th) day of February, May, August and November in each year commencing with the calendar year 1948, such quarterly instalments to be based upon the asset value of the Trust for the preceding year. When the asset value and the compensation are finally and accurately determined in the aforesaid manner for any year, any underpayment or overpayment of compensation which may have resulted from quarterly payments based on prior year valuations shall be deducted from or added to, as the case may be, the first quarterly payment of the succeeding year. The Trustee may rely conclusively upon certifications made by THE DONNER CORPORATION as to the aggregate reasonable value of the Trust Assets on which their compensation is based and the Trustee shall in no event be required to recover any overpayment of their compensation unless it is possible to do so in the manner hereinabove provided.

MISCELLANEOUS ADMINISTRATIVE CLAUSES

10. The Trustee shall be accountable only for reasonable diligence and the care of a prudent administrator in the management of the trust and shall not be liable for any act or default on the part of any attorney, auditor or broker or other person appointed by it hereunder, but shall only be liable for its own acts and defaults.

11. Any stock dividends or subscription rights or distribution of principal which may be received by the Trustee on investments from time to time held by it hereunder shall be added to and form a part of the principal of said trust fund and shall be subject to the trust herein created.

12. The Trustee shall charge all premiums and credit all discounts on investments against or to principal, as the [fol. 289] case may be, but not against or to income, and the Trustee shall not be required to create a reserve out of income for depreciation, obsolescence, amortization or other waste of principal. The Trustee shall be liable only for acts or omissions done or permitted to be done by it hereunder in bad faith but shall not be liable for acts or omissions done or permitted to be done in good faith.

13. The Trustee shall be entitled to receive as compensation two and one-half per centum of the gross income, payable at the time or times the other income is disbursed, or invested and one-half of one per centum on such part of the principal as shall be disbursed, provided, however, that if this trust is terminated within three years of the date hereof the commission on principal shall be three-tenths of the rate aforesaid; and provided further that if this trust is terminated after three years from the date hereof, and before the expiration of ten years from the date hereof, an additional one-tenth of the rate aforesaid shall be allowed for each additional year until ten years from the date hereof.

14. The Trustee shall furnish every three months statements of principal and income to the Advisor or Advisors then acting and also to any beneficiary hereunder who is an adult.

15. The Trustee accepts this trust and agrees to perform the same in accordance with its terms and conditions.

16. This trust shall be irrevocable and shall be construed in accordance with the laws of the State of Delaware.

IN WITNESS WHEREOF, ELIZABETH DONNER HANSON, the Trustor, has hereunto set her hand and seal and DELAWARE TRUST COMPANY, the Trustee, has caused this agreement to be signed in its name by one of its Vice Presidents and its [fol. 290] corporate seal to be hereunder affixed by its Assistant Secretary, all done in triplicate on the day and year first above written.

Witness:

/s/ Martha Mark Quinton

/s/ Elizabeth Donner Hanson (SEAL)

DELAWARE TRUST COMPANY

By /s/ Paul D. Lovett
Vice President

Attest: /s/ Eleanor L. Clemo
Assistant Secretary

Seal.

[fol. 291]

EXHIBIT B TO AFFIDAVIT

THIS AGREEMENT, made this twenty-sixth day of November A. D. 1948, between ELIZABETH DONNER HANSON, of Palm Beach, Florida, party of the first part, hereinafter called "Trustor" and DELAWARE TRUST COMPANY, a corporation of the State of Delaware, party of the second part, hereinafter called "Trustee".

WITNESSETH :

WHEREAS, the Trustor desires to establish a trust of certain securities and property described in Schedule "A" annexed hereto and made a part hereof, which securities and property together with the investments, reinvestments and proceeds thereof, and such other securities and property as hereafter may be received by the Trustee hereunder, are hereinafter called the trust fund.

NOW, THEREFORE, in consideration of the premises, the mutual covenants hereinafter set forth and the sum of One Dollar by the Trustee to the Trustor in hand paid, the receipt whereof is hereby acknowledged, the Trustor has assigned, transferred, and delivered and by these presents does assign, transfer, and deliver the securities and property described in said Schedule "A" unto the Trustee and its successors, IN TRUST, NEVERTHELESS, for the following uses, intents and purposes, that is to say :

1. The Trustee shall hold, manage, invest, and reinvest the trust fund, collect the income thereof, and after paying out of such income all taxes, charges, and expenses payable thereout, including compensation to the Trustee as hereinafter provided, shall until JOSEPH DONNER WINSOR, son of the Trustor, attains the age of twenty-five (25) years use such income or so much thereof as in its discretion may be considered advisable but with the consent and approval of the Adviser or Advisers (if there be Advisers or an Adviser then acting) for the support, maintenance, and education of the said JOSEPH DONNER WINSOR, accumulating and adding to the capital of the trust fund any income not so applied until the said JOSEPH DONNER WINSOR attains the age of twenty-five (25) years.

[fol. 292] 2. When the said JOSEPH DONNER WINSOR attains the age of twenty-five (25) years, the Trustee shall pay and deliver to him one-fourth ($\frac{1}{4}$) of the capital of the trust fund as it then is and thereafter shall pay to him the net income derived from the remainder of the trust fund during the remainder of his lifetime.

3. Upon the death of the said JOSEPH DONNER WINSOR, the Trustee shall hold the capital of the remaining trust fund for his issue or the issue of the Trustor or some one or more of them in such shares and proportions as the said JOSEPH DONNER WINSOR may either by instrument in writing executed by him during his lifetime and filed with the Trustee or by his Last Will and Testament direct and appoint. In default of such direction by the said JOSEPH DONNER WINSOR, or so far as it shall be void or shall not extend or take effect, the remainder of the trust fund shall be divided in equal shares per stirpes among the issue of the said JOSEPH DONNER WINSOR alive at the time of his death. If no issue of the said JOSEPH DONNER WINSOR shall survive him, then the capital of the remainder of the trust fund shall be divided in equal shares among the other children of Trustor alive at the time of his death with representation in favor of the issue of any such other child who may then be dead and have left issue then alive and in the event of there being no such other child or children or their descendants then living, then the capital of the remainder of the trust fund shall be paid to the next of kin of the Trustor in accordance with the intestate laws of the State of Delaware then in force, and as if the Trustor had died intestate immediately after the death of the said JOSEPH DONNER WINSOR.

4. No person being or claiming to be a child of ROBERT NEWSOM DONNER, (brother of the Trustor) born before the eighth (8th) day of January, 1924, or a descendant of any such person, shall be included in the foregoing purposes as a next of kin of the Trustor.

[fol. 293] 5. The expression "descendants of the Trustor" wherever used in this agreement shall include adopted children of the Trustor and their descendants.

6. All the benefits conferred upon the beneficiaries hereunder are given upon the express condition that they shall at all times be exempt from seizure or attachment and further that so long as any portion of the trust fund or the revenue therefrom is in the possession of the Trustee it shall be incapable of being assigned by any beneficiary in favor of any person other than the issue of such beneficiary or the descendants of the Trustor but this shall not in any way affect the powers hereinafter conferred on the Trustee. None of the property hereby given shall either in capital or in revenue fall into or form part of any community of property which may subsist between such beneficiary and his or her consort and the share of any female beneficiary shall be paid to her on her own receipt without the written authorization or consent of her husband being required.

GENERAL POWERS GRANTED TO TRUSTEE

7. Subject to the provisions and limitations herein expressly set forth, the Trustee shall have in general, the power to do and perform any and all acts and things in relation to the Trust Fund in the same manner and to the same extent as an individual might or could do with respect to his own property. No enumeration of specific powers herein made shall be construed as a limitation on the foregoing general power, nor shall any of the powers herein conferred upon the Trustee be exhausted by the use thereof, but each shall be continuing.

(a) The Trustee is specifically authorized and empowered:

(1) To retain any and all stocks, bonds, notes, securities and/or other property constituting the original trust fund or added thereto without liability on the part of the Trustee for any decrease in the value thereof.

[fol. 294] (2) To determine whether expenses and other disbursements shall be charged against principal or income or partly against principal and partly against income and such determinations shall be conclusive and binding upon all persons and corporations interested therein.

(3) To take and to hold any security or other property constituting a part of the trust fund, in bearer form or in its own name or in the name of its nominee or nominees, without disclosing its fiduciary capacity and the Trustee's liability shall be neither increased nor decreased thereby.

(4) To make any division or distribution of the trust fund herein provided for in cash or in kind, or partly in cash and partly in kind and to value and apportion the property to be so divided or distributed, which valuation and apportionment shall be final and conclusive upon all persons and corporations interested therein.

(b) Subject to the direction in writing of the Advisor or Advisors hereinafter named or their successor or successors as such Advisor, the Trustee is also specifically authorized and empowered:

(1) To sell at public or private sale, exchange for like or unlike property, convey, lease for terms longer or shorter than the trust and otherwise dispose of any and all property, real or personal, held in the trust fund for such price and upon such terms and credits as the Trustee may deem proper.

(2) To invest the proceeds of any such sale or sales or any other money available for investment in such stocks, bonds, notes, securities and/or other property as may be deemed appropriate for this trust fund, irrespective of the rules of investment applying to trusts under any present or future laws of the State of Delaware or elsewhere, or to retain uninvested the proceeds of any such sale or any other money available for investment for such period of time as may be deemed to the best interest of the trust estate.

[fol. 295] (3) To vote directly or by proxy at any election or stockholders' meeting any shares of stock held hereunder.

(4) To participate in any plan or proceeding for protecting or enforcing any right, obligation or interest arising from any stock, bond, note or security held in the trust fund or for reorganizing, consolidating, merging or

adjusting the finances of any corporation issuing the same, to accept in lieu thereof any new or substituted stocks, bonds, notes and/or securities, whether of the same or a different kind or class or with different priorities, rights or privileges, to pay any assessment or any expense incident thereto and to do any other act or thing that the Trustee may deem necessary or advisable in connection therewith.

(c) If at any time during the continuance of this trust there shall be no Advisor of the trust, or if the Advisor of the trust shall fail to give any written direction or to communicate in writing to the Trustee, his or her approval or disapproval as to the exercise of any of the aforesaid powers contained in paragraph (b), within 30 days after the Trustee shall have sent to the Advisor, by registered mail, at his or her last known address, a written request for such consent, the Trustee is hereby authorized and empowered to take such action in the premises as it, in its sole discretion, shall deem to be for the best interest of the trust estate.

POWERS RESERVED TO THE TRUSTOR.

8. The Trustor and/or any other person may at any time and from time to time add to the trust fund by assigning, transferring, conveying, delivering or making payable to the Trustee cash, securities and/or other property; and all such cash, securities and other property shall be held by the Trustee subject to the terms of this trust.

9. The Trustor nominates, constitutes and appoints The Donner Corporation, a Pennsylvania corporation, to be the Advisor of this trust, and reserves the right at any time and from time to time by written notice to the Trustee, to nominate additional, alternative and/or succeeding Advisor or Advisors of the trust, to revoke any such nomination and/or to remove any existing Advisor or Advisors of the trust. Any additional alternative and/or succeeding Advisor or Advisors may be a person, firm, association and/or corporation. Any such

nomination, revocation or removal shall become effective at the time or times and upon the happening of the event or events and subject to such conditions specified in such nomination, revocation or removal. Any such nomination may provide that the Advisor or Advisors so appointed shall be paid by the Trustee a reasonable fee in an amount to be agreed upon by the Trustee and the said Advisor or Advisors, not to exceed four per cent of the gross income of the trust fund in any year, in compensation of his or their services and the expenses as Advisor or Advisors of the trust; provided, however, that so long as THE DONNER CORPORATION, a Pennsylvania corporation, is serving as the Advisor of the Trust, the annual compensation for its services as such Advisor shall be One Hundred Twenty-five Dollars (\$125.00) for each One Hundred Thousand Dollars (\$100,000.00) of asset value in the Trust and the asset value for this purpose shall be determined to be the mean between the reasonable asset value of the first day of January and the last day of December of each year. In calculating the compensation on asset value so determined the minimum fee shall be One Hundred Twenty-five Dollars (\$125.00) per annum and whenever the asset value on such valuation dates exceeds One Hundred Thousand Dollars (\$100,000.00), the excess over units of One Hundred Thousand Dollars (\$100,000.00) if less than Fifty Thousand Dollars (\$50,000.00) shall be disregarded, and if more than Fifty Thousand Dollars (\$50,000.00), be regarded as a full unit of One Hundred Thousand Dollars (\$100,000.00). Said compensation shall be paid out of the income of the Trust in quarterly instalments on the tenth (10th) day of February, May, August and November in each year commencing with the calendar year 1948, such quarterly instalments to be based upon the asset value of the trust for the preceding year. When the asset value and the [fol. 297] compensation are finally and accurately determined in the aforesaid manner for any year, any underpayment or overpayment of compensation which may have resulted from quarterly payments based on prior year valuations shall be deducted from or added to, as the case may be, the first quarterly payment of the succeeding

dred and forty in virtue of a Power of Attorney executed before E. C. Common, Notary, on the Fourth day of January Nineteen hundred and forty under Number 11111 of his minutes.

Dated at Montreal this Twelfth day of August Nineteen hundred and forty.

/s/ H. P. Honey, N. P.

[fol. 311]. SCHEDULE "A" TO EXHIBIT "C"

KATHERINE N. RODGERS (DENCKLA) TRUST

BONDS

- \$80,000. County of Cameron, Texas, Ref. Road 3 — 5% due 10th April.
 \$16,000 — 1953
 4,000 — 1963
 20,000 — 1969
 20,000 — 1970
 20,000 — 1971
- \$40,000. City of Detroit, Michigan "Water" 4 $\frac{1}{4}$ % due 15th December 1959
- \$50,000. City of Los Angeles, California, "Electric Plant Revenue" 4% due 1st Dec.
 \$10,000 — 1974
 40,000 — 1975
- \$25,000. State of Arkansas "Highway" 5% due 1st April 1974.
- \$25,000. Township of North Bergen, New Jersey, Refunding 4 — 4 $\frac{1}{2}$ % due 1st Dec. 1975.
- \$25,000. City of Montgomery, Alabama, "School" 5% due 1st January 1959.
- \$50,000. Washington Toll Bridge Authority Revenue 4% due 1st December 1968.
- \$25,000. Commonwealth of Pennsylvania Turnpike Revenue 3 $\frac{3}{4}$ % due 1st August 1968.
- \$20,000. Province of British Columbia, Canada 4 $\frac{1}{4}$ % due 1st April 1945.

year. The Trustee may rely conclusively upon certifications made by THE DENNER CORPORATION as to the aggregate reasonable value of the Trust assets on which their compensation is based and the Trustee shall in no event be required to recover any overpayment of their compensation unless it is possible to do so in the manner hereinabove provided.

MISCELLANEOUS ADMINISTRATIVE CLAUSES

10. The Trustee shall be accountable only for reasonable diligence and the care of a prudent administrator in the management of the trust and shall not be liable for any act or default on the part of any attorney, auditor or broker or other person appointed by it hereunder, but shall only be liable for its own acts and defaults.

11. Any stock dividends or subscription rights or distribution of principal which may be received by the Trustee on investments from time to time held by it hereunder shall be added to and form a part of the principal of said trust fund and shall be subject to the trust herein created.

12. The Trustee shall charge all premiums and credit all discounts on investments against or to principal, as the case may be, but not against or to income, and the Trustee shall not be required to create a reserve out of income for depreciation, obsolescence, amortization or other waste of principal. The Trustee shall be liable only for acts or omissions done or permitted to be done by it hereunder in bad faith but shall not be liable for acts or omissions done or permitted to be done in good faith.

13. The Trustee shall be entitled to receive as compensation two and one-half per centum of the gross income, payable at the time or times the other income is disbursed or invested and one-half of one per centum on such part [fol. 298] of the principal as shall be disbursed; provided, however, that if this trust is terminated within three years of the date hereof the commission on principal shall be three-tenths of the rate aforesaid; and provided further that if this trust is terminated after three years from the date hereof, and before the expiration of ten years

from the date hereof, an additional one-tenth of the rate aforesaid shall be allowed for each additional year until ten years from the date hereof.

14. The Trustee shall furnish every three months statements of principal and income to the Advisor or Advisors then acting and also to any beneficiary hereunder who is an adult.

15. The Trustee accepts this trust and agrees to perform the same in accordance with its terms and conditions.

16. This trust shall be irrevocable, and shall be construed in accordance with the laws of the State of Delaware.

IN WITNESS WHEREOF, ELIZABETH DONNER HANSON, the Trustor, has hereunto set her hand and seal and DELAWARE TRUST COMPANY, the Trustee, has caused this agreement to be signed in its name by one of its Vice Presidents and its corporate seal to be hereunto affixed by its Assistant Secretary, all done in triplicate on the day and year first above written.

/s/ Elizabeth Donner Hanson (SEAL)

DELAWARE TRUST COMPANY

By: /s/ Paul D. Lovett
Vice President

Seal

Attest: /s/ Eleanor L. Clemon
Assistant Secretary

Witness:

/s/ Martha Mark Quinton

BEFORE

Mtfe. HERBERT BAYNE McLEAN the undersigned Notary for the Province of Quebec practising at the City of Montreal,

APPEARED:

WILLIAM HENRY DONNER of Montreux in Switzerland Retired Manufacturer presently in the City of Montreal;

Hereinafter called "the Donor"

PARTY OF THE FIRST PART:

AND

MONTREAL TRUST COMPANY a corporation duly incorporated and having its head office at the City of Montreal herein acting and represented by FREDERICK G. DONALDSON its Vice-President and General Manager and JOHN C. KELLY its Assistant General Manager both of the City of Montreal and hereunto duly authorized as they declare;

Hereinafter called "the Trustee"

PARTY OF THE SECOND PART:

WHO HAVE ENTERED INTO THE FOLLOWING AGREEMENT
NAMELY:

ARTICLE I. The Donor hath conveyed to the Trustee by gift inter vivos and irrevocable for the benefit of his adopted daughter DAME KATHERINE N. RODGERS of Villa Nova in the State of Pennsylvania one of the United States of America, formerly wife of C. PAUL DENCKLA, and her issue in trust the securities set out in Schedule "A" hereto annexed and signed for identification by the parties hereto and the undersigned Notary which securities or other property acquired by reinvesting the said securities or at any time representing them is hereinafter called the "Trust Fund".

ARTICLE II. The Trustee acknowledges the receipt of the said securities which it undertakes to hold in trust always upon the trusts and for the purposes following namely:

(a) The Trustee shall invest and reinvest the trust fund in accordance with the powers hereinafter conferred upon it and shall receive the income from the trust fund and shall pay the net annual income from the trust fund to the said Dame Katherine N. Rodgers (Denckla) in quarterly instalments during the remainder of her lifetime. [fol. 300] (b) And on the death of the said Dame Katherine N. Rodgers (Denckla) the Trustee shall divide the capital of the trust fund in equal shares so that there shall be one of such equal shares for each child in the first degree of the said Dame Katherine N. Rodgers (Denckla) then alive and one of such equal shares for the issue of any such child in the first degree who may then be dead and have left issue then alive and shall deal with such shares as follows:

1. The Trustee shall set aside one of such equal shares for each such child in the first degree then alive and shall pay to such child during his or her lifetime the net income derived from such share provided that while any such child is a minor the Trustee shall use the income from the share or so much thereof as the Trustee in its uncontrolled discretion may deem necessary or advisable for the benefit of such child accumulating and adding to the capital of the share any income not so applied and upon the death of such child in the first degree the Trustee shall hold the capital of the share thus set aside for such child in trust for his or her issue or the issue of the Donor or some one or more of them in such shares and proportions as such child in the first degree may either by instrument executed by such child during his or her lifetime and filed with the Trustee or by his or her last Will and Testament direct and appoint. In default of such direction by such child or so far as it shall be void or shall not extend or take effect the capital of such share shall be divided in equal shares par souches among the issue of such

child alive at the time of his or her death. If no issue of such child shall survive him or her then such share shall be divided in equal shares among the other children in the first degree of the said Dame Katherine N. Rodgers (Denckla) then alive with representation in favour of the issue of any such child who may then be dead and have left issue then alive and in the event of there being no such other children or their descendants then alive then the capital shall be paid to the abintestate heirs of the Donor then alive in accordance with the laws of the Province of Quebec as then in force and as if the Donor had died intestate immediately after the death of such child.

[fol. 301] 2. The Trustee shall set aside one of such equal shares for the issue of any such child in the first degree who may then be dead and have left issue then alive and shall divide such share in equal shares par souches among such issue the shares of such issue to be paid to them on their respectively attaining the age of twenty-one years, the shares of such issue to be vested in ownership in such issue but to be retained by the Trustee until each of such issue attains the age of twenty-one years but in the meantime the Trustee shall until such person attains that age pay to or use for such person the income from his or her share or so much thereof as the Trustee in its uncontrolled discretion may deem necessary or advisable and any income not so applied shall be accumulated and added to the capital of the share.

(c) If on the death of the said Dame Katherine N. Rodgers (Denckla) there be no issue in any degree of hers then alive then the Trustee shall divide the capital of the trust fund equally par souches among the descendants of the Donor then alive or if there be no such descendants to his abintestate heirs then alive in accordance with the laws of the Province of Quebec as then in force and as if the Donor had died intestate immediately after the death of the said Dame Katherine N. Rodgers (Denckla).

(d) No person being or claiming to be a child of Robert Newsom Donner (son of the Donor) born before the Eighth day of January Nineteen hundred and twenty-four or a descendant of any such person shall be included for the foregoing purposes as a descendant of the Donor.

(e) The expression "descendants of the Donor" wherever used in this deed shall include adopted children of the Donor and their descendants.

ARTICLE III. The Trustee is authorized and empowered to receive any additional property and securities which may from time to time be added to the trust fund by the Donor or any other person and to hold such property and securities in the same manner as is herein specified with respect to the property forming the original trust fund provided however that any property and securities which the Donor or any person contemplates adding to the trust fund shall be acceptable to the Trustee and/or approved in writing by the Advisers or Adviser of the Trustee.

ARTICLE IV. All the benefits conferred upon the beneficiaries hereunder are given upon the express condition that they shall at all times be exempt from seizure or [fol. 302] attachment and further that so long as any portion of the trust fund or the revenue therefrom is in the possession of the Trustee it shall be incapable of being assigned by any beneficiary in favour of any person other than the issue of such beneficiary or the descendants of the Donor but this shall not in any way affect the powers hereinafter conferred on the Trustee. None of the property hereby given shall either in capital or in revenue fall into or form part of any community of property which may subsist between such beneficiary and his or her consort and the share of any female beneficiary shall be paid to her on her own receipt without the written authorization or consent of her husband being required.

ARTICLE V. With the consent of the Trustee, ROBERT NEWSOM DONNER, son of the Donor, MRS. DORA DONNER IDE,

daughter of the Donor, and JOHN STEWART, son-in-law of the Donor, are appointed Advisers to the Trustee and are hereinafter referred to as "the Advisers" or if a corporation is appointed in their place such corporation is referred to as "the Adviser".

An Adviser may resign at any time without any judicial or other authorization being required and in the event of the death resignation incapacity or refusal to act of any individual Adviser the remaining or surviving Advisers or Adviser shall act.

The Advisers shall have power at any time to appoint other advisers or an adviser to take their place and they may appoint a corporation organized under the laws of any state, province or country as sole Adviser and any new Advisers or Adviser so appointed shall have the same powers duties and discretions in connection with the investment and management of the trust fund as are set forth in this deed and as if they or it had been originally named herein as such Advisers or Adviser.

If for any reason there is no Adviser acting at any time then the Trustee shall act alone in respect to the investment and management of the trust fund.

ARTICLE VI. The Trustee shall sell, exchange, invest and reinvest, borrow money with or without security, on the security of any of the trust assets or on any other security furnished by any other person, procure extensions of any such loans or pay any such loans in whole or in part out of the trust assets, borrow securities, loan money or securities, buy stocks, bonds or other securities outright, on margin or on any other terms, conditions, contracts or arrangements which it might make if acting in an individual capacity as shall be directed by the Advisers and shall in every respect follow their directions in respect to the investment and management of the trust fund, and no sales, exchanges, investments or reinvestments of the trust fund shall be made by the Trustee except on the directions of the Advisers given in writing or in the manner hereinafter provided. The Trustee shall be fully protected in respect of any sales, exchanges, investments and reinvestments; borrowings or

loans as shall be directed by the Advisers or Adviser and shall not be liable or responsible in any way for depreciation or loss incurred by reason of any such sales, exchanges, investments or reinvestments or borrowings or loans or for depreciation or loss incurred by reason of the retention of any investments authorized by the Advisers or Adviser or by reason of the retention of any securities added to the trust fund by the Donor or others or for any failure to invest any funds held by the Trustee uninvested. The Trustee shall not refuse to make any investment or reinvestment of the trust funds on the ground that such investment or reinvestment is unusual in nature or involving risk to the trust fund or of a character not proper for the investment of the trust funds or of a character not authorized by the laws of the Province of Quebec or the decisions of its courts or by the laws and decisions of any other province, estate or jurisdiction and shall not refuse to borrow money on such terms and conditions as may be directed by the Advisers or Adviser. The Trustee is authorized to accept and act on the instructions of the Advisers or Adviser given by telephone, telegraph, cable or by letter or written message and shall not be required to investigate the genuineness of such directions given by telephone, telegram or cable, or to obtain any written confirmation thereof.

The Trustee shall notify the Advisers or Adviser when capital funds are available for investment or when some action should in its opinion be taken in reference to any securities comprised in the trust fund.

ARTICLE VII. In the event that the Advisers shall fail to furnish the Trustee for a period of six months with directions for the investment or reinvestment of any uninvested funds, or shall fail to furnish the Trustee for a period of six months with instructions as to reinvestment of any securities, in respect to which in the opinion of the Trustee instructions should be furnished or if there is no Adviser [fol. 304] then acting the Trustee shall without any directions and on its own discretion invest and reinvest the trust fund or any part thereof in shares of stock (of any classification, including common stock) bonds, notes, securities or obligations of any corporation, whether now

or hereafter formed and wherever organized, in real property wherever situated in bonds or notes secured by mortgages on real estate wherever situated, in stocks, bonds, securities or obligations of any government, state, country or municipality, foreign and domestic, and such property, investments and securities of any class, kind or character which it may deem suitable for the trust, and in making such investments and reinvestments it shall not be restricted to property and securities of the character authorized for trust investments by the laws of the Province of Quebec or the decisions of its courts or by the laws and decisions of any other province, state or jurisdiction, and in making investments and reinvestments, the Trustee, when authorized to make investments, shall have the same powers as are herein set forth for investments made at the direction of the Advisers or Adviser including the power to borrow money, extend and pay loans, buy securities outright, on margin or any other terms, conditions, contracts, or arrangements which it might make if acting in an individual capacity and the Trustee shall not be in any way limited by the restrictions which arise out of the usual relationship of a Trustee and beneficiary.

ARTICLE VIII. Subject to the provisions hereinbefore set forth the Trustee is authorized and empowered to retain any and all investments authorized by the Advisers or Adviser and also such additional properties as may from time to time be added to the trust fund and subject also to the provisions hereinbefore set forth the Trustee is hereby given full power of sale and exchange in connection with any and all property and securities from time to time comprising the trust fund and shall have full power to sell, lease, mortgage or exchange any real estate forming part of the trust fund at such times and upon such terms and conditions as it may deem proper and to make, execute and deliver good and sufficient deeds, leases, mortgages or other instruments affecting such real estate. The Trustee may lease real estate for any period of time without regard to the duration of the trust or the term fixed by any statute and without authorization by any court.

[fol. 305] ARTICLE IX. Subject to the direction of the Advisers or Adviser or if there are no Advisers or Adviser acting then without such direction, the Trustee is authorized and empowered to vote in person or by proxy upon all stocks or other securities held by it; and in connection with the execution of proxies may delegate such of its discretionary powers as it may deem best; to exchange the securities of any corporation for other securities issued by such corporation or by any other corporation at such times and upon such terms and conditions as the Trustee shall deem proper; to consent to the reorganization, consolidation or merger of any corporation, or to the sale or lease of its property, or any portion thereof, to any person or corporation, or to the lease by any person or corporation of his or its property or any portion thereof, to such corporation, and upon any such reorganization, consolidation, merger, sale or lease, to exchange the securities held by it for the securities issued in connection therewith; to pay all such assessments, subscriptions and other sums of money as the Trustee may deem expedient for the protection of its interests as holder of any stocks, bonds or other securities of any corporation; to exercise any options appurtenant to any stocks, bonds or other securities for the conversion thereof into other securities, or to exercise any rights to subscribe for additional stocks, bonds or other securities and to make any and all necessary payments therefor; to retain the securities issued in connection with any such reorganization, consolidation, merger, sale or lease, or acquired as the result of the exercise of any options or rights to subscribe appurtenant to such securities whether or not such securities are of the class herein permitted for the investment of the trust fund; and generally to exercise with respect to all stocks, bonds or other investments held by the Trustee all such rights, powers and privileges as may be lawfully exercised by any person owning similar property in his own right.

ARTICLE X. No purchaser upon a sale by the Trustee shall be bound to see to the application of the purchase money arising therefrom or to inquire into the validity, expediency or propriety of any such sale. All contracts,

agreements and undertakings entered into by the Trustee on behalf of the trust shall be binding only on the trust fund and shall create no liability whatsoever on the part of the Trustee in respect to any of its assets which are held by it in an individual capacity and which are not part of the trust fund.

[fol. 306] ARTICLE XI. The Trustee shall be accountable only for reasonable diligence and the care of a prudent administrator in the management of the trust and shall not be liable for any act or default on the part of any attorney, auditor or broker or other person appointed by it hereunder but shall only be liable for its own acts and defaults.

ARTICLE XII. All cash dividends whether ordinary or extraordinary shall be treated by the Trustee as income, but all dividends declared by a Company and payable in stock of the same Company (ordinarily called "stock dividends") shall be added to the capital of the trust fund.

All dividends of every nature declared by corporations engaged in mining, the production of lumber, oil, gas, sulphur, the sale of real estate or other similar activities (commonly called "wasting asset corporations") or paid by a corporation holding stock of any such wasting asset corporation, or derived directly or indirectly from the operations of any such wasting asset corporation, shall be treated by the Trustee as income. Nothing in this Article, XII, contained shall be construed to apply to dividends paid or distributions made to the Trustee upon the liquidation or dissolution of a corporation.

ARTICLE XIII. All provisions of this agreement with respect to the investment and reinvestment of the trust fund and borrowing therefor shall also apply to the investment and reinvestment and borrowing with respect to any income which the Trustee is directed to accumulate.

ARTICLE XIV. The Trustee shall not be required to cause the securities or other property held by it to be registered or held in its name as Trustee but in its discretion may cause such securities or other property or any part thereof

to be registered or held in the name of its nominee or may retain such securities or other property unregistered and in bearer form without describing the trust, so that title to such securities or other property shall pass by the delivery thereof, but without thereby increasing or decreasing its liability as Trustee.

ARTICLE XV. In the event that bonds, notes or other evidences of indebtedness shall be received by the Trustee or purchased for the trust fund at a premium, the Trustee shall not set aside any part of the income thereof as a sinking fund to absorb such premium.

ARTICLE XVI. In any case in which the Trustee is required, pursuant to the provisions of this agreement, to divide the trust fund, or any portion thereof, into parts [fol. 307] or shares, or to distribute the same, it is authorized and empowered in its sole discretion to make such division or distribution in kind or in money, or partly in kind and partly in money, and for that purpose to allot specific securities or other property, real or personal, or undivided interests therein to any such part or share, and for the purpose of such allotment the determination of the Trustee concerning the propriety thereof and the value of the property and securities so allotted for the purpose of such division or distribution shall be binding and conclusive on all persons and corporations interested therein.

ARTICLE XVII. In the event that any of the transactions entered into by the Trustee shall result in any profit to or increase in the assets of the trust, all such increases for all purposes hereunder, shall be deemed to be principal or corpus of the trust and not income, except as is expressly otherwise provided in respect to dividends in Article XII hereof.

ARTICLE XVIII. The Trustee is also authorized in the discharge of its duties to employ counsel and agents and to determine and pay them reasonable compensation, and it shall be entitled to reimbursement therefor and for such other expenses and charges as it may deem necessary and proper to incur out of the principal or income of the

trust as the Trustee shall determine. The Trustee may in ~~the~~ relation of these presents act on the opinion or advice of or information obtained from any lawyer, auditor, broker or other expert and shall not be responsible for any loss occasioned by acting or not acting thereon and shall be entitled to take legal or other advice and employ such assistance as may be necessary to the proper discharge of its duties, and to pay proper and reasonable compensation for such legal and other advice as an expense under the administration of the trust.

ARTICLE XIX. The Trustee shall furnish every three months statements of capital and income to the Advisers or Adviser then acting and also to any beneficiary hereunder who is an adult.

ARTICLE XX. The Trustee shall be entitled to receive as compensation for its services such fees as may be agreed upon from time to time between it and the Advisers or Adviser and such fees shall be payable out of capital or income as may be agreed upon.

[fol. 308.] The Advisers or the Adviser shall be entitled to receive as compensation the sum of Six hundred United States dollars per year payable out of the income from the trust fund to be divided equally among the Advisers if more than one is acting.

The values of such property and securities on the dates such property and securities are distributed by the Trustee shall be the basis for the computation of commissions on principal, and such commission shall be deducted from the principal of the trust fund as such property and securities are distributed.

ARTICLE XXI. This Trust has been accepted by the Trustee in the Province of Quebec and all questions pertaining to its construction shall be determined in accordance with the laws of that Province.

ARTICLE XXII. The appointment of Montreal Trust Company as Trustee is made subject to the condition that the Advisers or Adviser then in office shall have the right at any time by written instrument executed by them or it

and delivered to the Trustee to revoke its appointment or that of any successor trustee thereafter appointed and to name a new Trustee or Trustees in its place in the same manner as if the Trustee had resigned in accordance with the provisions of Article XXIII. of this instrument. In such instrument there shall be set forth the date on which the power of the trustee to act as trustee of the trust created by this instrument shall terminate, and such instrument shall be affective to terminate the power of the trustee in the same manner as if the trustee had voluntarily resigned as trustee of the trust created by this instrument pursuant to the provisions permitting such resignation and such trustee shall be deemed to have retired and ceased to act as trustee on the date set forth in said instrument.

ARTICLE XXIII. The Trustee may resign at any time and this without any judicial or other authorization being required.

The Advisers or Adviser then in office shall have the power and authority to designate and appoint by written instrument executed and acknowledged by them or it a trust company or other corporation having a place of business in or outside the Dominion of Canada as trustee under this trust in the place and stead of the original Trustee named herein and in like manner from time to [fol. 309] time to designate and appoint a successor trustee to fill any vacancy caused by the resignation of any trustee then acting. Any such successor Trustee appointed under the foregoing provisions upon the execution of its written consent accepting the office of trustee hereunder shall have all the powers, duties and discretion of the Trustee originally named herein. On the resignation of a Trustee or on the retirement of any Trustee in accordance with the foregoing provisions the Advisers or the Adviser then in office may release such resigning or retiring Trustee from all liability for the acts and doings of such Trustee hereunder and such release shall be binding upon all persons interested in this trust. No bond or other security shall be required of any trustee or successor trustee of this trust for the faithful performance of its duties hereunder.

ARTICLE XXIV. The Trustee is authorized to pay out of the trust fund or out of the income therefrom all taxes or other impositions which may be levied or imposed on the trust fund or any part thereof or on any beneficiary thereunder on account of his interest in the trust hereby created or which may be imposed on any Trustee hereunder on account of its holding such office.

ARTICLE XXV. The Trustee by joining in the execution of this instrument signifies its acceptance of the trust and it also accepts on behalf of the beneficiaries.

WHEREOF ACTE:

THUS DONE AND PASSED at the City of Montreal this Sixth day of August Nineteen hundred and forty and of record in the office of the undersigned Notary under the Number Eight thousand five hundred and fifty-five.

And after due reading hereof the parties signed in the presence of the said Notary.

(Signed) William H. Donner

MONTREAL TRUST COMPANY,
F. Donaldson
Vice-President &
General Manager

J. C. Kelly
Assistant General
Manager

H. B. McLEAN, N. P.

(Seal of Montreal
Trust Company)

[fol. 310] I hereby certify this to be a true copy of minute Number 8555 forming part of the records of HERBERT BAYNE McLEAN of the City of Montreal, Notary, whose mandatory I am for the period beginning on the Fourth day of January Nineteen hundred and forty and terminating on the Thirty-first day of December Nineteen hun-

This is Schedule "A" referred to in the Deed of Donation by William Henry Donner to Montreal Trust Company (Trustee) executed before H. B. McLean, Notary, on the Sixth day of August Nineteen hundred and forty and thereto annexed signed for identification by the parties thereto and the undersigned Notary after having been acknowledged to be true and annexed to Number 8555 of his original Minutes.

FOR IDENTIFICATION:

(Signed) William H. Donner

MONTREAL TRUST COMPANY,

" F. Donaldson

Vice-President &
General Manager

" J. C. Kelly

Assistant General
Manager

" H. B. McLEAN, N. P.

A true copy.

/s/ H. P. HONEY, N. P.

[fol. 312]

ATTACHMENT TO EXHIBIT, "C"

October 11, 1940

Montreal Trust Company

511 Place d'Armes

Montreal, P. Q.

RE: KATHERINE N. RODGERS DENCKLA TRUST

Dear Sirs:

Under Article V of the Deed of Donation by William Henry Donner to your Company as Trustee setting up a Trust for Katherine N. Rodgers Denckla and executed before H. B. McLean, Notary, on the Sixth day of August,

Nineteen hundred and forty, under the No. 8555 of his original minutes the undersigned were appointed Advisers to the Trustee and it was provided that we might resign at any time and that we should have power at any time to appoint other Advisers or an Adviser to take our place and that we might appoint a Corporation as sole Adviser.

In exercise of the power conferred upon us under the said Deed of Donation, we hereby notify you that we have resigned the office of Advisers under the said Trust and we appoint in our place as sole Adviser to the said Trust, Donner Estates, Incorporated, a corporation organized under the laws of the Commonwealth of Pennsylvania.

You will, therefore, in future be guided by the advice of the said Donner Estates, Incorporated as Adviser.

Very truly yours,

/s/ Robert N. Donner

/s/ John Stewart

/s/ Dora Donner Ide

[fol. 313] ATTACHMENT TO EXHIBIT "C"

BEFORE Mtre. HERBERT BAYNE McLEAN the undersigned
Notary for the Province of Quebec practising
at the City of Montreal;

APPEARED:

WILLIAM HENRY DONNER of Montreux in
Switzerland, Retired Manufacturer, presently in the City
of Montreal;

Hereinafter called "the Donor"

PARTY OF THE FIRST PART:

AND

MONTREAL TRUST COMPANY a corporation duly incorporated and having its head office at the City of Montreal herein acting and represented by CHARLES

D. CORNELL and JAMES PATON ANGUS, two of its Assistant General-Managers, both of the City of Montreal and hereunto duly authorized as they declare;

Hereinafter called "the Trustee"

PARTY OF THE SECOND PART:

WHO DECLARED UNTO THE UNDERSIGNED NOTARY AS FOLLOWS:

That by Deed of Donation executed before H. B. McLean Notary on the Sixth day of August Nineteen hundred and forty under the Number 8555 of the original minutes of the said Notary and registered in the Registry Office for the Registration Division of Montreal under the Number 482671 (hereinafter referred to as the "original Donation") the Donor conveyed to the Trustee by gift inter vivos and irrevocable for the benefit of his adopted daughter DAME KATHERINE N. RODGERS of Villa Nova in the State of Pennsylvania one of the United States of America formerly wife of C. PAUL DENCKLA and her issue in trust the securities set out in Schedule "A" annexed to the said deed to be held by it upon the trusts and for the purposes therein set forth;

That under Article III. of the original Donation the Trustee was authorized and empowered to receive any additional property and securities which might from time to time be added to the trust fund by the Donor or any other person and to hold such property and securities in the same manner as was therein specified with respect to the property forming the original trust fund provided however that any property and securities which the Donor or any person contemplated adding to the trust fund should be acceptable to the Trustee and/or approved in [fol. 314] writing by the Advisers or Adviser of the Trustee;

That the Donor wishes now to convey to the Trustee in the same way and for the same purposes certain other securities;

NOW THEREFORE THE PARTIES HAVE AGREED AND THESE PRESENTS AND I THE SAID NOTARY WITNESS:

1. The Donor hath conveyed to the Trustee by gift inter vivos and irrevocable for the benefit of the said DAME KATHERINE N. RODGERS (DENCKLA) and her issue the securities set out in Schedule "A" hereto annexed and signed for identification by the parties hereto and the undersigned Notary.

2. The Trustee acknowledges the receipt of the said securities which it undertakes to hold in trust always upon the trusts and for the purposes set out in the original Donation and in the same manner as if the securities set out in Schedule "A" annexed to this deed had been included in the original Donation.

3. The Trustee by joining in the execution of this deed signifies acceptance of the trust and it also accepts this additional donation on behalf of the beneficiaries.

WHEREOF ACTE :

THUS DONE AND PASSED at the City of Montreal this Twentieth day of June Nineteen hundred and forty-one and of record in the office of the undersigned Notary under the Number Eight thousand eight hundred and ninety-three.

And after due reading hereof the parties signed in the presence of the said Notary.

(Signed) W. H. Donner

" MONTREAL TRUST COMPANY,

C. D. Cornell,

Assistant General Manager

J. P. Angus,

Assistant General Manager

" H. B. McLEAN, N. P.

A true copy of the original hereof remaining of record in my office.

/s/ H. B. McLean, N. P.

SCHEDULE "A"KATHERINE N. RODGERS DONORLA TRUSTBONDS:

- \$10,000. Dominion of Canada 4% due 1st October 1960
- \$10,000. Canadian National (West Indies) Steam Ship Limited 5% due 1st March 1955
- \$15,000. City of Edmonton 5-4½% due 1st February 1967
- \$20,000. Harbour Commissioners of Montreal 5% due 1st November 1969
- \$15,000. Province of Manitoba 5% due 2nd December 1959
- \$10,000. City of Montreal 4½% due 1st April 1951
- \$10,000. Province of New Brunswick 3% due 1st July 1944
- \$10,000. Province of Nova Scotia 4½% due 15th November 1948
- \$15,000. Province of Ontario 5% due 2nd December 1960
- \$20,000. Saguenay Power Company Ltd. 4¼% due 1st April 1966
- \$10,000. Shawinigan Water & Power Company 4½% due 1st October 1967
- \$10,000. City of Vancouver 5% due 1st June 1944

This is Schedule "A" referred to in the Deed of Donation by William Henry Donner to Montreal Trust Company (Trustee) executed before H. B. McLean, Notary, on the Twentieth day of June Nineteen hundred and forty-one and thereto annexed signed for identification by the parties thereto and the undersigned Notary after having been acknowledged to be true and annexed to Number 8893 of his original Minutes.

FOR IDENTIFICATION:

(Signed) W. H. Donner

MONTREAL TRUST COMPANY,C. D. Cornell,
Assistant General ManagerJ. P. Angus,
Assistant General ManagerH. B. McLEAN, N. P.A true copy./s/ H. B. McLean, N. P.

[fol. 316] ATTACHMENT TO EXHIBIT "C"

Philadelphia, Pa.

June 23, 1941.

Montreal Trust Company,
511 Place d'Armes,
Montreal, P. Q.

Dear Sirs:

Re: WILLIAM H. DONNER (#8555)—
KATHERINE N. RODGERS DENCKLA TRUST

Under the provisions of Article XXII of the Deed of Donation by William Henry Donner to your Company as Trustee setting up a Trust for Katherine N. Rodgers Denckla, which Deed was executed before Herbert Bayne McLean, Notary, for the Province of Quebec practising in the City of Montreal, on the 6th day of August, 1940, under the number 8555 of his original Minutes, it is provided that the Advisers or Adviser then in office shall have the right at any time by written instrument executed by them or it and delivered to the Trustee to revoke its appointment or that of any successor Trustee thereafter appointed and to name a new Trustee or Trustees in its place in the same manner as if the Trustee had resigned in accordance with the provisions of Article XXIII of said Deed.

Acting pursuant to the power and authority vested in this Corporation, the sole Adviser now acting hereunder, having been duly appointed to office by the Advisers originally named in the Deed, who resigned such office on the 11th of October, 1940, having named this Corporation in their place, we hereby revoke the appointment of your Company as Trustee and designate DELAWARE TRUST COMPANY, a corporation of the State of Delaware, of Wilmington, Delaware, U. S. A., as successor Trustee in place and stead of your Company, and your power to act under the aforesaid Deed of Donation shall terminate June 26, 1941, as of which date the successor Trustee has agreed and consented to accept the office of Trustee.

Your accounts are to be submitted to this Corporation as soon as possible after the effective date of the revocation of your appointment, in order that we, as Adviser, may grant to you, as Trustee, the release provided for under the provisions of Article XXIII.

[fol. 317] We, of course, understand that a certain amount of time will elapse from June 26, 1941, the effective date of the revocation of your appointment, and the time you are able to obtain the necessary releases from us, the Dominion Income Tax Authorities, and from the Foreign Exchange Control Board and the Custodian at Ottawa, and you will receive authority from DELAWARE TRUST COMPANY, a corporation of the State of Delaware, of Wilmington, Delaware, U. S. A., as successor Trustee, to act as its Agent from the date it assumes that office, pending the time all such formalities have been complied with enabling you to turn over the securities and cash comprising the Trust Fund and the income, if any, accumulated therefrom, and your appointment as Agent to the successor Trustee has our approval.

Very truly yours,

DONNER ESTATES, INC.

/s/ John Stewart
President

/s/ John T. Lyons
Vice-President

[fol. 318]

ATTACHMENT TO EXHIBIT "C"

Philadelphia, Pa.

June 23, 1941.

Delaware Trust Company,
Wilmington,
Delaware.

Dear Sirs:

Re: WILLIAM H. DONNER (#8555)—
KATHERINE N. RODGERS DENCKLA TRUST

This Corporation is now acting as Sole Adviser under a certain Deed of Donation by William Henry Donner to Montreal Trust Company, Montreal, as Trustee, setting up a Trust for Katherine N. Rodgers Denckla, which Deed was executed before Herbert Bayne McLean, Notary, for the Province of Quebec, practising in the City of Montreal, on the 6th day of August, 1940, under the number 8555 of his original Minutes. The advisers named in the said Deed resigned that office on the 11th day of October, 1940, and appointed this Corporation as Sole Adviser to said Trust in their place and stead.

Pursuant to the power and authority now vested in this Corporation as Adviser under the provisions of the aforesaid Deed of Donation, it has been decided by us to revoke the appointment of Montreal Trust Company as Trustee and in its place and stead we hereby designate and appoint you, Delaware Trust Company, a corporation of the State of Delaware, of Wilmington, Delaware, as successor Trustee. Montreal Trust Company's power as Trustee is to cease and terminate as of June 26, 1941, the effective date of the revocation of its appointment and removal and as from which date it is our wish that you shall consent to act as successor Trustee, assuming the powers, duties and discretion conferred on the Trustee originally named under said Deed.

Very truly yours,

DONNER ESTATES, INC.

/s/ John Stewart
President

/s/ John T. Lyons
Vice-President

Philadelphia, Pa.

June 23, 1941.

Delaware Trust Company,
Wilmington,
Delaware.

Dear Sirs:

Re: WILLIAM H. DONNER (#8555)—
KATHERINE N. RODGERS DENCKLA TRUST

Further to our letter of the 23rd instant, whereby we appointed your Company as successor Trustee under that certain Deed of Donation by William Henry Donner to Montreal Trust Company, Montreal, as Trustee, setting up a Trust for Katherine N. Rodgers Denckla, which Deed was executed before Herbert Bayne McLean, Notary, on the 6th day of August, 1940, under the number 8555 of his original Minutes.

As the original Trustee is to submit, as soon as possible after the effective date of the revocation of its appointment, its accounts to us in order that we may grant to it release from all liability and as it is necessary for the original Trustee also to obtain releases from the Dominion Income Tax Authorities and from the Foreign Exchange Control Board and Custodian at Ottawa, Canada, it will be unable to turn over to you until some time after the date upon which you assume the office of successor Trustee, the securities and cash comprising the Trust Fund and income, if any, accumulated therefrom.

We would ask you, therefore, to kindly accept this letter as your authority to appoint Montreal Trust Company as your Agent, in order that they may continue to administer the Trust on your behalf and subject to your instructions, pending such time as the requisite releases are obtained and Montreal Trust Company is in a position to release

and to make over to you the Trust Fund and any accumulated income.

Very truly yours,

DONNER ESTATES, INC.

/s/ John Stewart
President

/s/ John T. Lyons
Vice-President

[fol. 320] ATTACHMENT TO EXHIBIT "C"

Wilmington, Delaware

June 26, 1941.

Donner Estates, Inc.
Lincoln-Liberty Building,
Philadelphia, Pa.

Dear Sirs:

We hereby accept, as of this date, the appointment of and consent to act as successor Trustee to Montreal Trust Company, the Trustee originally named in the Deed of Donation above referred to.

Yours faithfully,

DELAWARE TRUST COMPANY

By—

/s/ E. M. Taylor
Vice-President

Attest—

/s/ R. U. Altemus
Secretary.

[fol. 321]

ATTACHMENT TO EXHIBIT "C"

Wilmington, Delaware

June 26, 1941.

Montreal Trust Company,
511 Place d'Armes,
Montreal, P. Q.

Dear Sirs:—

Re: WILLIAM H. DONNER (#8555)—
KATHERINE N. RODGERS DENCKLA TRUST

As you are aware, this Company has agreed to accept the appointment and consented to act as successor Trustee under that certain Deed of Donation by William Henry Donner to your Company, as Trustee, setting up a Trust for Katherine N. Rodgers Denckla, which Deed was executed before Herbert Bayne McLean, Notary, on the 6th day of August, 1940, under the number 8555 of his original Minutes, which office is to be assumed by us as from June 26, 1941.

We understand that pending your obtaining certain necessary releases you will be unable to turn over to us the Trust Fund and the income, if any, to be derived therefrom, and in order to facilitate the administration of the Trust until such time as you turn over to us the Trust Fund and the income, we hereby name, with the approval of Donner Estates, Inc., your Company as our Agent, and we will furnish you with instructions from time to time regarding the operation of the Trust until you are in a position to make over and deliver to us the Trust Fund and income.

Yours faithfully,

DELAWARE TRUST COMPANY

By—

/s/ E. M. Taylor
Vice-President

Attest—

/s/ R. U. Altemus
Secretary.

[fol. 322] Clerk's Certificate to foregoing paper omitted in printing.

[fol. 323] ATTACHMENT TO STIPULATION

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

Civil Action No. 531

ELIZABETH DONNER HANSON, as Executrix and Trustee
under the Last Will of Dora Browning Donner, deceased,
Plaintiff,

v.

WILMINGTON TRUST COMPANY, et al., Defendants.

PROVINCE OF QUEBEC,
DISTRICT OF MONTREAL, ss.:

I, George Ainslie Goad, of the Town of Montreal West in the Province of Quebec, being duly sworn, do depose and say:

1. That I am an Assistant General Manager of the Montreal Trust Company having been employed by it since the 2nd January, 1929.

2. That on December 3rd, 1949, I met with Dora Browning Donner, Dorothy Doyle and Lydia MacFarland at the apartment of Dora Browning Donner at the Rittenhouse Plaza in Philadelphia, Pennsylvania. At that time in my presence and in the presence of Dorothy Doyle and Lydia MacFarland, Dora Browning Donner signed a Last Will and Testament and also an instrument which I understood to be an instrument exercising a power of appointment given to her in a Trust Agreement dated March 25th, 1935 between Wilmington Trust Company, as Trustee, and Dora Browning Donner. The said Last Will and Testament was signed by Dorothy Doyle and Lydia MacFarland as subscribing witnesses in the presence of each other, in my presence and in the presence of Dora Browning Donner. The said instru-

ment exercising the power of appointment given in the Trust Agreement dated March 25th, 1935 was signed by Dorothy Doyle as subscribing witness in my presence and in the presence of Dora Browning Donner. Attached hereto [fol. 324] are copies of the said Last Will and Testament and the said instrument exercising the power of appointment executed on December 3rd, 1949 by Dora Browning Donner and marked for identification Exhibits A and B, which are initialled by me for identification. I have examined these copies and to the best of my knowledge and belief they are respectively true and correct copies of said Last Will and Testament and said instrument.

3. That on July 7th, 1950 I met with Dora Browning Donner and Grace E. Stalker at the Windsor Hotel in Montreal, Canada, and at said time Dora Browning Donner executed in my presence and in the presence of Grace E. Stalker a further instrument which I understood to be an instrument further exercising the power of appointment given to her under a Trust Agreement dated March 25th, 1935 between Wilmington Trust Company, Trustee, and Dora Browning Donner, and in my presence and in the presence of Dora Browning Donner, Grace E. Stalker signed her name thereto as a subscribing witness. A true and correct copy of such instrument is attached hereto and marked Exhibit C, which is initialled by me for identification.

And I make this solemn declaration conscientiously believing it to be true and knowing that it is of the same force and effect as if made under oath and by virtue of the "Canada Evidence Act".

And I Have Signed.

G. A. Goad

Sworn to before me at Montreal, Quebec, this tenth day of November, 1954.

Matthew C. Holt, Commissioner of the Superior Court for the District of Montreal.

[fol. 324A] Clerk's Certificate to foregoing paper omitted in printing.

[fol. 325] ATTACHMENT TO STIPULATION

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

Civil Action No. 531

ELIZABETH DONNER HANSON, as Executrix and Trustee
under the Last Will of Dora Browning Donner, deceased,
Plaintiff,

v.

WILMINGTON TRUST COMPANY, et al., Defendants.

COUNTY OF PHILADELPHIA,
COMMONWEALTH OF PENNSYLVANIA, ss.:

Be It Remembered that on this 12th day of November, 1954, personally appeared before me, the undersigned, a Notary Public for the State and County aforesaid, C. Kenneth Baxter, who being by me duly sworn did depose and say:

[fol. 329] 10. At no time did Dora Browning Donner either directly or indirectly attempt to direct, suggest or consult with the advisors under paragraph 5 of the trust agreement dated March 25, 1935 with respect to any phase of their duties as such advisors, but on the contrary, such advisors performed their duties as advisors solely in accordance with their own best independent judgments. In the performance of their duties as advisors the advisors instructed the Wilmington Trust Company as trustee to purchase, sell or otherwise deal with the securities held in trust without ever advising Dora Browning Donner with respect thereto either before or after action was taken by the Wilmington Trust Company or at any other time.

11. At the time of the appointment dated December 3, 1949 under the agreement of March 25, 1935 between Dora

Browning Donner and Wilmington Trust Company as trustee, and at all times thereafter, Katherine N. R. Denckla and Dorothy B. R. Stewart and their respective issue had substantial incomes from various other trusts.

12. During 1940 and 1941, William H. Donner created trusts for the benefit of each of his then living grandchildren, including then living children of his legally adopted daughters Katherine N. Rodgers Denckla and Dorothy B. Rodgers Stewart. The grandchildren so provided for included Paula Browning Denckla, William Donner Denckla, Dora Stewart Lewis, Mary Washington Stewart Borie, William Donner Roosevelt and Curtin Winsor, Jr. Neither Donner Hanson nor Joseph Donner Winsor had been born when said trusts were created and as a result no provision was made for them under said trusts. Subsequently Donner Hanson and Joseph Donner Winsor acquired beneficial interests under other trusts which were relatively small in value as compared with the aforementioned 1940 and 1941 trusts. On December 3, 1949 [fol. 330] and at all times until the death of Dora Browning Donner the value of the corpus of each of the respective trusts under which the grandchildren (other than Joseph Donner Winsor and Donner Hanson) of William H. Donner had beneficial interests exceeded by more than \$200,000 the corpus of each of the respective trusts under which Donner Hanson and Joseph Donner Winsor had beneficial interests; and the corpus of the trusts for Joseph Donner Winsor and Donner Hanson, when increased by the assets appointed to them by the instruments dated December 3, 1949 and July 7, 1950 exercising the power of appointment granted to Dora Browning Donner by the agreement dated March 25, 1935 between her and the Wilmington Trust Company as trustee, are each of a substantially lesser value than the corpus of each of the trusts for the other grandchildren.

C. Kenneth Baxter

Sworn to and subscribed before me the day and year first above written.

Miriam V. Moyer, Notary Public.

Notary Public. My Commission Expires January 29, 1955. (SEAL)

[fol. 331] Clerk's Certificate to foregoing paper omitted in printing.

[fol. 332] ATTACHMENT TO STIPULATION
1133.9

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

PETITION FOR ORDER AUTHORIZING TRANSFER OF MONEY
TO FOREIGN TRUSTEE

IN THE MATTER OF DOROTHY B. R. STEWART,
an insane person.

To the Chancellor of the State of Delaware:

The petition of Elwyn L. Middleton respectfully represents;

(1) Your petitioner was appointed guardian for Dorothy B. R. Stewart, who is a resident citizen of Palm Beach County, State of Florida, by decree of the County Judges' Court in and for Palm Beach County, Florida, dated December 22, 1952, to succeed E. Harris Drew who had theretofore been appointed her guardian by decree of said Court. The said Dorothy B. R. Stewart has been previously adjudged to be incompetent because of paranoid schizophrenia. A copy of said order dated December 22, 1952, is attached hereto and filed herewith. The said County Judges' Court in and for Palm Beach County, Florida, has, under the laws of the State of Florida, jurisdiction and power to appoint guardians for insane or incompetent citizens within said county.

(2) Delaware Trust Company, a corporation of the State of Delaware, is trustee under agreement of trust dated June 1, 1943, entered into by and between Dorothy B. R. Stewart and Delaware Trust Company, designated as Trust No. 8000, which is fully revocable by the said Dorothy B. R. Stewart, and from which the said Dorothy B. R. Stewart may reasonably anticipate an annual income of approximately Fourteen Thousand Dollars (\$14,000.00).

Delaware Trust Company is also the trustee under an agreement of trust dated August 19, 1940, created by William H. Donner, designated as Trust No. 8553, which is irrevocable and under the terms of which Dorothy B. R. Stewart is entitled to receive an annual income for the term of her life. Wilmington Trust Company, a corporation of the State of Delaware, is the trustee under an agreement of trust dated March 19, 1932, created by William H. Donner, designated as Trust No. 1778, which is irrevocable, and under the terms of which Dorothy B. R. Stewart is entitled to receive the annual income for the term of her life. The anticipated annual income from the two latter trusts is approximately Sixty-six Thousand Dollars (\$66,000.00) a year. A description of the property of the said Dorothy B. R. Stewart is included in the inventory filed by a former guardian in the County Judges Court in and for Palm Beach County, a certified copy of which is attached to his petition filed in this Court on May 11, 1949.

(3) In compliance with the provisions of 3097 of the Revised Code of Delaware (1935), your petitioner, Elwyn L. Middleton, files herewith a certificate showing his appointment as guardian for Dorothy B. R. Stewart, according to the laws of the State of Florida, and under the seal of the County Judges Court in and for Palm Beach County, Florida, which certificate further shows that your petitioner is invested with the care and management of the Estate of Dorothy B. Stewart, with authority to receive and liability to account for said estate, and that your petitioner has duly qualified by giving security in accordance with the decree of his appointment in the sum of One Hundred Thousand Dollars (\$100,000.00), and your petitioner avers that said sum of One Hundred Thousand Dollars (\$100,000.00), the principal amount of his said bond, is at least equal to the whole amount of the property owned by the said Dorothy B. R. Stewart, excepting real estate and tangible personal property outside the State of Delaware, [fol. 334] and the revocable trust which the Delaware Trust Company is trustee, as to the latter of which your petitioner does hereby consent to the entry of an order by this Court directing Delaware Trust Company, as trustee, not to pay over any of the principal of said revocable trust to

Sworn to and subscribed before me the day and year first above written.

Edna H. Gerdine, Notary Public.

Edna H. Gerdine, Notary Public. My Commission
Expires March 6, 1957:

(SEAL)

[fol. 360] Clerk's Certificate to foregoing papers omitted in printing.

[fol. 362] AFFIDAVIT OF SERVICE (omitted in printing).

[fol. 363] [File endorsement omitted]

[fol. 364] SUPREME COURT OF THE UNITED STATES

No. 977, October Term, 1956

DORA STEWART LEWIS, MARY WASHINGTON STEWART BORIE
AND PAULA BROWNING DENCKLA, Petitioners,

v.

ELIZABETH DONNER HANSON, as Executrix and Trustee
Under the Last Will of Dora Browning Donner, Deceased, et al.

ORDER ALLOWING CERTIORARI—June 17, 1957

The petition herein for a writ of certiorari to the Supreme Court of the State of Delaware is granted. The case is consolidated with No. 918 and a total of two hours allowed for oral argument.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

your petitioner without the further order of this Court. Your petitioner also files herewith a copy of the final account of the said E. Harris Drew, as guardian, and a copy of the decree of the County Judges Court in and for Palm Beach County, Florida, dated January 29, 1953, approving said account and discharging the said E. Harris Drew from further duties and liabilities as Guardian of the property of the said Dorothy B. R. Stewart.

Wherefore, your petitioner prays that this honorable Court may enter an order authorizing Delaware Trust Company and Wilmington Trust Company, trustees under the respective trusts hereinbefore mentioned, to assign, transfer and pay over to your petitioner, as guardian, all of the income payable unto the said Dorothy B. R. Stewart from time to time under the terms of said trust, and likewise authorizing your petitioner as guardian to receive the same.

And your petitioner will ever pray, etc.

Elwyn L. Middleton, Guardian for Dorothy B. R. Stewart, an insane person.

Wm. H. Foulk, William Duffy, Jr., Attorneys for Petitioner.

STATE OF FLORIDA,
PALM BEACH COUNTY, ss.:

Be It Remembered that on this 18th day of March, A.D. 1953, personally came before me, the subscriber, a Notary [fol. 335] Public in and for the County and State aforesaid, Elwyn L. Middleton, guardian for Dorothy B. R. Stewart, an insane person, who being by me duly qualified according to law did depose and say that he is the petitioner within named; that what is set forth in the foregoing petition is true so far as it concerns his own act and deed, and that he believes that what is therein set forth to be true so far as it relates to the acts or deeds of any other person or persons.

Elwyn L. Middleton, Guardian for Dorothy B. R. Stewart, an insane person.

Sworn to and subscribed before me the day and year first above written.

Mrs. Bertie M. Herring, Notary Public, State of Florida,
at Large.

Bertie M. Herring, Notary Public.

Notary Public, State of Florida at Large. My Commission expires Feb. 13, 1956. Bonded by American Surety Co. of N. Y.

[fol. 343]

ATTACHMENT TO PETITION OF
ELWYN L. MIDDLETON

1133.9

PROBATE ORDER

B 75 P 147

IN THE COURT OF THE COUNTY JUDGE, IN AND FOR
PALM BEACH COUNTY, FLORIDA

No. 8293

In the Matter of:

THE GUARDIANSHIP OF DOROTHY B. R. STEWART,
An Incompetent.

ORDER ACCEPTING RESIGNATION OF GUARDIAN AND
APPOINTING SUCCESSOR GUARDIAN

This cause came on to be heard upon the resignation of E. Harris Drew, as one of the guardians of the person and the guardian of the property of the above incompetent, containing application for the appointment of a successor guardian, the final return of said E. Harris Drew, as guardian, and the application of said guardian for final compen-

sation, after due notice, and the court being advised in the premises; it is thereupon

Ordered and Adjudged that the final return of E. Harris Drew, as one of the guardians of the person and as the guardian of the property of the above incompetent, is hereby approved and his resignation accepted. Upon E. Harris Drew transferring to his successor, when qualified, all of the assets of the ward now in his hands, said E. Harris Drew shall be fully discharged as guardian of the person and property and Letters of Discharge shall issue; the sum of \$4000.00 is hereby found and determined to be reasonable final compensation for said guardian and said guardian is hereby authorized to pay said amount to himself from the funds in his hands prior to transfer of the assets of the ward to the successor guardian.

It Is Further Ordered and Adjudged that Elwyn L. Middleton be, and he hereby is, appointed as guardian of the property of the above incompetent, and upon taking [fol. 344] the oath and providing proper bond in the sum of \$100,000.00, to be approved by the Court, Letters of Guardianship shall issue.

It Is Further Ordered and Adjudged that all previous orders concerning the management of the ward's property shall remain in full force and effect, all subject to the further order of the court.

Done and Ordered at West Palm Beach, Florida, this 22nd day of December, 1952.

Seal, County Judge, Palm Beach County, State of Florida.

Richard P. Robbins, County Judge.

[fol. 345] ATTACHMENT TO PETITION OF
ELWYN L. MIDDLETON

Drew's Form D.H.R.—8
GUARDIANSHIP

PROBATE ORDER

B 75 P 149

IN THE COUNTY JUDGE'S COURT, IN AND FOR
PALM BEACH COUNTY, FLORIDA

No. 8293

IN RE: GUARDIANSHIP OF DOROTHY B. R. STEWART;
An Incompetent.

LETTERS OF GUARDIANSHIP (744.40)

Whereas, Elwyn L. Middleton was appointed guardian of the Property² of Dorothy B. R. Stewart by the undersigned county judge on December 22nd, 1952; and

Whereas, the said guardian has taken oath and given bond, as required by law, and is entitled to letters of guardianship;

Now, Therefore, I, Richard P. Robbins, county judge in and for the county of Palm Beach, state of Florida, by virtue of the power and authority by law in me vested, do hereby declare the said Elwyn L. Middleton to be duly qualified under the laws of the state of Florida to act as guardian of the property,² of Dorothy B. R. Stewart, incompetent because of mental incompetence with full power to ask, demand, sue for, recover, and receive any assets belonging to said incompetent; to pay the debts of said incompetent, if any, so far as the assets of her estate will permit and the law direct, and to protect the interests of said incompetent and her estate according to law, and to render due accounts of his guardianship.

In witness whereof, I hereunto set my hand and affix the seal of said court, at West Palm Beach, Florida, this 22nd day of December, 1952.

Richard P. Robbins, County Judge.

(SEAL)

I hereby certify that, on December 22nd, 1952, the foregoing letters of guardianship were recorded, as required by law.

Richard P. Robbins, County Judge.

(SEAL)

[fol. 346]

By Ruby M. Ball, Clerk.

¹ Letters of guardianship are not necessary to the validity of the order appointing a guardian. F.S.A. 744.40.

² Person or property, or both.

³ Minority or mental or physical incompetency.

147

[fol. 347]

ATTACHMENT TO PETITION OF
ELWYN L. MIDDLETON

Drew's Form D.H.R.—66
GUARDIANSHIP

IN THE COUNTY JUDGE'S COURT, IN AND FOR
PALM BEACH COUNTY, FLORIDA

No. 8293

IN RE: GUARDIANSHIP OF DOROTHY B. R. STEWART,
An Incompetent.

LETTERS OF DISCHARGE¹ (746.15)

Whereas, E. Harris Drew, as guardian of the property of Dorothy B. R. Stewart, has filed his petition for final discharge and his final returns with supporting receipts

and vouchers, and has asked the court for a discharge as such guardian; and

Whereas, it appears to the court that the said E. Harris Drew has faithfully acted as such guardian, has made disposition of the assets of the ward according to law and has rendered true accounts of his guardianship, and that an order of final discharge has been entered;

Now, therefore, I, Richard P. Robbins, county judge in and for said county, by virtue of the power and authority vested in me by law, do hereby declare the said E. Harris Drew duly discharged under the laws of the state of Florida as guardian of the property² of Dorothy B. R. Stewart,

In witness whereof, I hereunto set my hand and affix the seal of said court, at West Palm Beach, Florida, January 29th, 1953.

Richard P. Robbins, County Judge.

(SEAL)

I hereby certify that, on January 29th, 1953, the foregoing letters of discharge were recorded, as required by law.

Richard P. Robbins, County Judge.

(SEAL)

By Ruby M. Ball, Clerk.

¹ Letters of discharge are not necessary to the validity of a discharge. F.S.A. 746.15.

² And of the person, if that is the case.

[fol. 348] ATTACHMENT TO PETITION OF
ELWYN L. MIDDLETON

IN THE COUNTY JUDGE'S COURT OF
PALM BEACH COUNTY, FLORIDA

I, the undersigned, Clerk of the County Judge's Court in and for Palm Beach County, Florida, the same being a Court of Record and having probate jurisdiction, Do Hereby Certify that the foregoing is a true and correct

photostatic copy of Final Return, filed on the 22nd day of December, 1952, recorded in Probate Annual Book 18, Page 434; Order Accepting Resignation of Guardian and Appointing Successor Guardian, dated and filed for record on the 22nd day of December, 1952, recorded in Probate Order Book 75, Page 147; Letters of Guardianship, issued to Elwyn L. Middleton on the 22nd day of December, 1952, at West Palm Beach, Florida, filed for record on the 22nd day of December, 1952, recorded in Probate Order Book 75, Page 149; Letters of Discharge, issued to F. Harris Drew on the 29th day of January, 1953, at West Palm Beach, Florida, filed for record in this Court on the 29th day of January, 1953, recorded in Probate Order Book 75, Page 502, in the matter of the estate of Dorothy B. R. Stewart, Incompetent.

I further certify that on this date said Letters issued to Middleton are in full force and effect as the same appears from the records and files of the County Judge's Office of Palm Beach County, Florida,

In Testimony Whereof, I have hereunto set my hand and seal of said Court at West Palm Beach, Florida, this the 19th day of March, A. D. 1953.

/s/ Ruby M. Ball, Clerk of the County Judge's Court
of Palm Beach County, Florida.

(SEAL)

[fol. 349] ATTACHMENT TO STIPULATION

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

STATE OF DELAWARE,
NEW CASTLE COUNTY, ss:.

I, Robert A. Stevenson, Register of the Court of Chancery of the State of Delaware, in and for New Castle County, do hereby certify that the foregoing is a true and correct copy of the Petition for Order Authorizing Transfer of Money to Foreign Trustee filed in this Court on the

27th day of March, A. D. 1953 and Certifications annexed thereto showing the Appointment of Elwyn L. Middleton Guardian for Dorothy B. R. Stewart under the seal of the County Judges Court in and for Palm Beach County, Florida, and showing that Elwyn L. Middleton is invested with the care and management of the Estate of Dorothy B. R. Stewart, a mentally ill person, as the same is on file and remains of record in this Court.

In Testimony Whereof, I have hereunto set my hand and affixed the Seal of said Court at Wilmington, this 5th day of October, A. D. 1955.

Robert A. Stevenson, Register in Chancery:

(SEAL)

[fol. 350]

ATTACHMENT TO STIPULATION

1133.9

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

IN THE MATTER OF DOROTHY B. R. STEWART,
an insane person.

And Now, to wit, this 27th day of March, A.D. 1953, the petition of Elwyn L. Middleton, Guardian, having been presented, and it appearing that Dorothy B. R. Stewart is a resident of Palm Beach County, Florida, and is an insane person; that Delaware Trust Company and Wilmington Trust Company, both corporations of the State of Delaware, hold in trust certain property from which the income is payable to the said Dorothy B. R. Stewart; that Delaware Trust Company further holds in a revocable trust certain property of the said Dorothy B. R. Stewart, and that the said Elwyn L. Middleton, Guardian, consents to the entry of an order by this Court directing the said Delaware Trust Company as Trustee not to pay over any of the principal of said revocable trust to him without the further order of this Court; that the said Elwyn L. Middleton has been appointed as the Guardian for the said Dorothy B. R. Stewart, an insane person, to succeed E.

Harris Drew by the County Judges Court in and for Palm Beach County, Florida, which Court under the laws of Florida has jurisdiction and power to appoint guardians for insane or incompetent persons within said Palm Beach County, and that the said Guardian is by the laws of the State of Florida invested with the care and management of the estate of the said Dorothy B. R. Stewart, with authority to receive and liability to account for the same; and that the said Elwyn L. Middleton is entitled to receive from said Delaware Trust Company and Wilmington Trust Company, trustees as aforesaid, all of the income from the trusts mentioned and referred to in said petition, amounting to approximately Eighty Thousand Dollars (\$80,000.00) per annum;

[fol. 351] And it further appearing that by order dated the 22nd day of December, A.D., 1952, the said County Judges Court, in and for Palm Beach County, Florida, authorized the said Elwyn L. Middleton, as Guardian, to receive the income from the said trusts, and directed that the said Guardian account for the same, and further provided that the bond in the sum of One Hundred Thousand Dollars (\$100,000.00) given by said Guardian was sufficient to cover the income and the amounts of money coming into his hands as Guardian as aforesaid;

And it further appearing that said bond is sufficient in amount to comply with the provisions of Title 12, Sec. 3709 of the Del. Code of 1953.

And it further appearing that a certificate showing the appointment of the said Elwyn L. Middleton as Guardian for the said Dorothy B. R. Stewart, has been filed in accordance with the provisions of Section 3097 of the Revised Code of Delaware of 1935 pertaining to foreign trustees for insane or weak-minded persons;

It is, on motion of William H. Foulk, Esquire, attorney for petitioner,

Ordered that the said Delaware Trust Company and Wilmington Trust Company be and each of them hereby is authorized to pay over unto Elwyn L. Middleton, Guardian for the said Dorothy B. R. Stewart, the income from

the trusts created by agreements of William H. Donner, dated August 19, 1940, and March 19, 1932, respectively, of which Delaware Trust Company and Wilmington Trust Company are the respective trustees, as the same shall from time to time accrue and become payable; and that the said Elwyn L. Middleton, Guardian appointed as aforesaid, is hereby authorized to receive the same and transfer the income to the State of Florida, wherein the said guardian was duly appointed; and

[fol. 352] It Is Further Ordered that the said Delaware Trust Company be and it hereby is further authorized to pay over unto the said Elwyn L. Middleton, Guardian for the said Dorothy B. R. Stewart, the income from the trust created by agreement dated June 1, 1943, by and between Dorothy B. R. Stewart and Delaware Trust Company, as Trustee, as the same shall from time to time accrue and become payable; and that the said Elwyn L. Middleton, Guardian appointed as aforesaid, is hereby authorized to receive the same and transfer the said income to the State of Florida, wherein the said Guardian was duly appointed, but that the said Delaware Trust Company be and it hereby is directed not to pay over any of the principal of said trust to the said Elwyn L. Middleton without the further order of this Court; and

It Is Further Ordered that notice of this order be forthwith given to Delaware Trust Company and Wilmington Trust Company, and to that end the Register in Chancery is hereby directed to forward a certified copy of this order to each of said companies by registered mail, return receipt requested; and

It Is Further Ordered, that the costs of this proceeding, which are hereby taxed in the sum of Nine and 00/100 Dollars (\$9.00), be paid by Delaware Trust Company, Trustee, out of any income held by it for the benefit of Dorothy B. R. Stewart before paying such income over to the said Elwyn L. Middleton.

Collins J. Seitz, Chancellor.

[fol. 353]

ATTACHMENT TO ORDER

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTYSTATE OF DELAWARE,
NEW CASTLE COUNTY, ss.:

I, Robert A. Stevenson, Register of the Court of Chancery of the State of Delaware, in and for New Castle County, do hereby certify that the foregoing is a true and correct copy of the Petition for Order Authorizing Transfer of Money to Foreign Trustee filed in this Court on the 27th day of March, A. D. 1953 and Certifications annexed thereto showing the Appointment of Elwyn L. Middleton Guardian for Dorothy B. R. Stewart under the seal of the County Judges Court in and for Palm Beach County, Florida, and showing that Elwyn L. Middleton is invested with the care and management of the Estate of Dorothy B. R. Stewart, a mentally ill person, as the same is on file and remains of record in this Court.

In Testimony Whereof, I have hereunto set my hand and affixed the Seal of said Court at Wilmington, this 5th day of October, A. D. 1955.

Robert A. Stevenson, Register in Chancery.

(SEAL)

[fol. 354] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 355]

ATTACHMENT TO STIPULATION

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

Civil Action No. 531

ELIZABETH DONNER HANSON, as Executrix and Trustee
under the Last Will of Dora Browning Donner, deceased,
Plaintiff,

v.

WILMINGTON TRUST COMPANY, et al., Defendants.

AFFIDAVIT OF PAUL D. LOVETT

STATE OF DELAWARE,
NEW CASTLE COUNTY, ss.:

Be It Remembered that on this 24th day of October, 1955, personally appeared before me, the undersigned, a Notary Public of the State and County aforesaid, Paul D. Lovett, who being by me duly sworn, did depose and say:

1. That he is a Vice-President and in charge of the Trust Department of the Delaware Trust Company.
2. That the Delaware Trust Company is the Trustee under a certain trust agreement made on November 26, 1948 between Elizabeth Donner Hanson, party of the first part, and Delaware Trust Company, party of the second part, for the benefit of Donner Hanson and others, and the Delaware Trust Company is likewise the Trustee under [fol. 356] a trust agreement made on November 26, 1948 between Elizabeth Donner Hanson, party of the first part, and Delaware Trust Company, party of the second part, for the benefit of Joseph Donner Winsor, which said two trust agreements are marked Exhibits A and B and are attached to the affidavit of the affiant verified on November 12, 1954 and filed in the above cause.
3. That affiant has caused the records of the Delaware Trust Company to be examined for the purpose of ascertaining whether either Donner Hanson or Joseph Donner

Winsor has filed with the Delaware Trust Company as Trustee any instrument or instruments in writing for the purpose of exercising the powers of appointment conferred upon Donner Hanson and Joseph Donner Winsor, respectively, by paragraph 3 of each of the aforementioned two trust agreements, and affiant states that no such instrument in writing has ever been filed with the Delaware Trust Company by either Donner Hanson or Joseph Donner Winsor.

Paul D. Lovett

Sworn to and subscribed before me the day and year first above written.

Elizabeth O'Neill, Notary Public.
(SEAL)

[fol. 357] ATTACHMENT TO STIPULATION

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE .
IN AND FOR NEW CASTLE COUNTY

Civil Action No. 531

ELIZABETH DONNER HANSON, as Executrix and Trustee
under the Last Will of Dora Browning Donner, deceased,
Plaintiff,

v. :

WILMINGTON TRUST COMPANY, et al., Defendants.

AFFIDAVIT OF C. KENNETH BAXTER

COUNTY OF PHILADELPHIA,
COMMONWEALTH OF PENNSYLVANIA, ss.:

Be It Remembered that on this 24th day of October, 1955, personally appeared before me, the undersigned, a Notary Public for the County and Commonwealth aforesaid, C. Kenneth Baxter, who being by me duly sworn did depose and say:

1. From 1931 until September 1940 I was employed as an investment adviser by William H. Donner, the husband

of Dora Browning Donner, and/or members of his family and/or companies owned or controlled by them. I thereupon became employed as Secretary and Treasurer of Donner Estates, Inc. and from time to time thereafter I served as Secretary and Treasurer of Donner Estates, Inc. as Vice-President and since January 1, 1950 as President. Pertinent facts pertaining to Donner Estates, Inc. are set [fol. 358] forth in paragraph 2 of my affidavit verified November 12, 1954 and filed in the above cause.

2. From 1931 until the present my activities and business and personal relationship with William H. Donner and members of his family were such that I became intimately familiar with the terms of the numerous trusts created by William H. Donner and by certain members of his family, as well as the marital and blood relationships which existed in the Donner family, and the ages of certain members thereof. As a result I am able to state that Curtin Winsor, Jr. and Joseph Donner Winsor are sons of Elizabeth Donner Hanson by a former husband, Curtin Winsor. Curtin Winsor, Jr. was born on April 28, 1939 and Joseph Donner Winsor was born on September 18, 1941. Since prior to January 1, 1954 until the present time, Curtin Winsor, Jr. and Joseph Donner Winsor have resided in Florida with their mother. Donner Hanson is the son of Elizabeth Donner Hanson by her present husband, Benedict Hanson. Donner Hanson was born on October 14, 1948 and since prior to January 1, 1954 until the present time has resided in Florida with his mother. It is my belief that neither Joseph Donner Winsor, Curtin Winsor, Jr. or Donner Hanson have ever had issue. Because of my contacts and relations with members of the Donner family, I am certain that I would have heard of the fact if either of said persons had had issue.

C. Kenneth Baxter

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APR 17 1957

JOHN T. FEY, Clerk

IN THE

Supreme Court of the United States

October Term, 1956.

No. ~~918~~ 107

ELIZABETH DONNER HANSON, Individually, as Executrix of the Will of Dora Browning, Deceased, and as Guardian ad Litem for JOSEPH DONNER WINSOR and DONNER HANSON, and WILLIAM DONNER ROOSEVELT, Individually,
Appellants.

v.

KATHERINE N. R. DENCKLA, Individually, and ELWYN L. MIDDLETOWN, as Guardian of the property of DOROTHY BROWNING STEWART, Also Known as DOROTHY B. STEWART and DOROTHY B. RODGERS STEWART, an Incompetent Person,
Appellees.

JURISDICTIONAL STATEMENT.

WILLIAM H. FOULK,

229 Delaware Trust Bldg.,
Wilmington 1 Delaware.

MANLEY P. CALDWELL,

CALDWELL, PACETTI, ROBINSON & FOSTER,
501 Harvey Building,
West Palm Beach, Florida,

*Attorneys for Elizabeth Donner Hanson,
Individually, as Executrix of the Will of
Dora Browning Donner, Deceased, and
as Guardian ad Litem for Joseph Don-
ner Winsor and Donner Hanson, and
William Donner Roosevelt, Appellants.*

Of Counsel:

EDWARD MCCARTHY,

MCCARTHY, LANE & ADAMS,

423 Atlantic Bank Bldg.,
Jacksonville, Florida;

*Attorney for Elizabeth Donner Hanson
as Guardian ad Litem for Joseph
Donner Winsor and Donner Hanson.*

INDEX TO JURISDICTIONAL STATEMENT.

Page

OPINIONS BELOW	1
JURISDICTION	2
Nature of the Proceedings	2
Dates of Judgment of the Supreme Court of Florida and Its Order Denying Rehearing	2
Statutory Provisions Believed to Confer on This Court Jurisdiction of This Appeal	3
Cases Believed to Sustain Jurisdiction	3
Florida Statutes Involved	5
QUESTIONS PRESENTED BY THE APPEAL	7
STATEMENT OF THE CASE	8
THE FEDERAL QUESTIONS ARE SUBSTANTIAL	15
OPINIONS AND ORDERS APPENDED	19

TABLE OF CASES CITED.

	Page
Alton v. Alton, (C. A. 3, 1953) 207 F. 2d 667, 676	4
Armstrong v. Armstrong, (1956) 350 U. S. 568, 576	3
Baker v. Baker, Eccles & Co., (1916) 242 U. S. 394, 403	3, 4
Dahnke-Walker Milling Company v. Bondurant, (1921) 257 U. S. 282	3
Gulda v. Second National Bank, (S. J. C. Mass. 1948) 80 N. E. 2d 12	4
Hanson v. Wilmington Trust Co., (Del. Ch. 1956) 119 A. 2d 901	4
Home Life Insurance Co. v. Dick, (1930) 281 U. S. 397, 407, 408, 410	5, 18
Lewis v. Hanson, (Del. Supreme Ct. 1957) 128 A. 2d 819	3, 4, 15
Loucks v. Standard Oil Co., (N. Y. C. of A., 1918) 120 N. E. 198, 202	5
McArthur v. Scott, (1885) 113 U. S. 340, 396	4
Pemoyer v. Neff, (1878) 95 U. S. 714	3, 4
Riley v. New York Trust Co., (1942) 315 U. S. 343, 353	3, 4
Sadler v. Industrial Trust Co., (S. J. C. Mass. 1951) 97 N. E. 2d 169	4
Wilson v. Russ, (1880) 17 Fla. 691	4
Winn v. Strickland, (1894) 34 Fla. 610, 16 So. 606	4

STATUTES AND OTHER AUTHORITIES CITED.

	Page
Constitution of the United States:	
Article IV	4, 7, 8, 12, 17
Fourteenth Amendment	3, 4, 7, 10, 11, 12, 15, 17
Florida Statutes, Chapter 48, Secs. 48.01 and 48.02 ..	3, 5, 6, 7, 15, 16
United States Code, Title 28, Section 1257(2)	3

TABLE OF CONTENTS OF APPENDIX.

	Page.
I. Summary Final Decree of C. E. Chillingworth, Circuit Judge, in the Circuit Court of the Fifteenth Judicial Circuit of Florida, in and for Palm Beach County	1a
II. Opinion of the Supreme Court of Florida	4a
III. Order of Supreme Court of Florida	17a
IV. Opinion of the Supreme Court of the State of Delaware . .	18a
V. Order of the Supreme Court of the State of Delaware	44a

IN THE
Supreme Court of the United States.

OCTOBER TERM, 1956.

- No. _____

ELIZABETH DONNER HANSON, Individually, as Executrix of the will of Dora Browning Donner, Deceased, and as Guardian ad Litem for JOSEPH DONNER WINSOR and DONNER HANSON, and WILLIAM DONNER ROOSEVELT, Individually,

Appellants,

KATHERINE N. R. DENCKLA, Individually, and ELWYN L. MIDDLETON, as Guardian of the property of DOROTHY BROWNING STEWART, also known as DOROTHY B. STEWART and DOROTHY B. RODGERS STEWART, an incompetent person,

Appellees.

JURISDICTIONAL STATEMENT.

Appellants appeal from the judgment of the Supreme Court of Florida entered on September 19, 1956, with petition for rehearing denied on November 28, 1956, affirming in part and reversing in part a summary final decree of the Circuit Court of Palm Beach County, Florida, and submit this Statement to show that the Supreme Court of the United States has jurisdiction of the appeal and that substantial questions are presented.

OPINIONS BELOW.

(a) The opinion of the Supreme Court of Florida (4a) filed in this action is not yet reported. The opinion of the Circuit Court of Palm Beach County (1a) is unreported.

Emphasis used throughout is supplied unless otherwise noted. References to: T.— are to the certified transcript of the proceedings in State Court; —a to the Appendix hereto.

JURISDICTION.

(b) The jurisdiction of the Court is invoked on the following grounds:

Nature of the Proceedings.

(i) This action was brought to determine the validity of the exercise of a power of appointment reserved by Mrs. Dora B. Donner, a resident of the State of Florida at the date of her death, in an *inter vivos* trust created by her in Delaware by agreement dated March 25, 1935, with Wilmington Trust Company, of Wilmington, Delaware, as Trustee. The trust res has never been outside the State of Delaware and the Trustee has never been in the State of Florida, either *qua* corporation or through its representatives, and has not submitted itself to the jurisdiction of the Courts of that State. The appointees of \$417,000.00 of the trust assets are not residents of Florida, have not been personally served with process, and have not submitted themselves to the jurisdiction of the Florida Courts. The Court of Chancery of the State of Delaware and the Supreme Court of that State have decreed that the exercise of the power of appointment was legal and that the \$417,000.00 was properly paid by the Trustee to the appointees. The Supreme Court of Florida, however, claiming jurisdiction over the Wilmington Trust Company, as Trustee, and the nonresident appointees by constructive service, has declared that the exercise of the power of appointment was illegal. The Supreme Court of the State of Delaware in its opinion (128 A. Ad 819, 825) (18a) described the litigation in the Supreme Courts of the two States as "a headlong jurisdictional collision between the States."

Dates of Judgment of the Supreme Court of Florida and Its Order Denying Rehearing.

(ii) The date of the judgment of the Supreme Court of Florida sought to be reviewed is September 19, 1956.

Its order denying Appellants' Petition for Rehearing (17a) is dated November 28, 1956. Appellants filed a motion for leave to file an Extraordinary Petition for Rehearing (T. 279) based on the opinion of the Supreme Court of the State of Delaware, which was denied on February 18, 1957. Notice of Appeal was filed on February 21, 1957, in the Supreme Court of Florida (T. 325).

Statutory Provision Believed to Confer on This Court Jurisdiction of This Appeal.

(iii) Appellants believe that 28 U. S. C. Sec. 1257(2) confers jurisdiction of this appeal on this Court.

Cases Believed to Sustain Jurisdiction.

(iv) Appellants believe that the following cases sustain the jurisdiction of this Court:

(1) The application of Chapter 48 Florida Statutes (1953) 48.01 and 48.02 to obtain jurisdiction over non-resident trustees in possession of the trust res and nonresident beneficiaries, all of whom are indispensable parties, violates the Fourteenth Amendment of the Constitution of the United States.

Pennoyer v. Neff, (1878) 95 U. S. 714;

Baker v. Baker, Eccles & Co., (1916) 242 U. S. 394, 403;

Lewis v. Hanson, (Del. Supr. Ct. 1957) 128 A. 2d 819, 834;

Dahnke-Walker Milling Company v. Bondurant, (1921) 257 U. S. 282.

See also:

Riley v. New York Trust Co., (1942) 315 U. S. 343, 353;

Armstrong v. Armstrong, (1956) 350 U. S. 568, 576;

Jurisdictional Statement

Alton v. Alton, (C. A. 3, 1953) 207 F. 2d 667, 676 (holding that often "due process at home and full faith and credit in another state are correlative").

(I) Trustees having possession of the trust res are indispensable parties.

McArthur v. Scott, (1885) 113 U. S. 340, 396; ..

Wilson v. Russ, (1880) 17 Fla. 691;

Winn v. Strickland, (1894) 34 Fla. 610, 16 So. 606;

Sadler v. Industrial Trust Co., (S. J. C. Mass. 1951) 97 N. E. 2d 169;

Lewis v. Hanson, *supra*, 835.

(II) Beneficiaries are indispensable parties to an attack on the validity of the trust.

Guida v. Second Natl. Bank, (S. J. C. Mass. 1948) 80 N. E. 2d 12.

(2) The failure of the Supreme Court of Florida to give full faith and credit to the judgments of the Court of Chancery and the Supreme Court of the State of Delaware violates Article IV of the Constitution of the United States.

Lewis v. Hanson, *supra*, 831, 832;

Hanson v. Wilmington Trust Co., (Del. Ch. 1956) 119 A. 2d 901;

Riley v. New York Trust Co., *supra*;

Baker v. Baker, Eccles & Co., *supra*;

Pennoyer v. Neff, *supra*.

(3) The failure of the Supreme Court of Florida to apply Delaware law in making its decision constitutes a denial of due process of law in violation of the Fourteenth Amendment of the Constitution of the United States.

Home Life Insurance Co. v. Dick, (1930) 281

U. S. 397, 407, 408, 410;

Loucks v. Standard Oil Co.; (N. Y. C. of A., 1918)

120 N. E. 198, 202.

Florida Statute Involved.

(v) The full text of the Statute of the State of Florida (Chap. 48, Fla. St. (1953) 48.01 and 48.02, Vol. 1, p. 233), the validity of which is involved in this appeal, is:

48.01. *Service of process by publication, in what cases.*

Service of process by publication may be had, in any of the several courts of this state, and upon any of the parties mentioned in 48.02 in any suit or proceeding:

(1) To enforce any legal or equitable lien upon or claim to any title or interest in real or personal property within the jurisdiction of the court or any fund held or debt owing by any party upon whom process can be served within this state.

(2) To quiet title or remove any encumbrance, lien or cloud upon the title to any real or personal property within the jurisdiction of the court or any fund held or debt owing by any party upon whom process can be served within this state.

(3) For the partition of real or personal property within the jurisdiction of the court;

(4) For divorce or annulment of marriage;

(5) For the construction of any will, deed, contract or other written instrument and for a judicial declaration or enforcement of any legal or equitable right, title, claim, lien or interest thereunder.

(6) For the reestablishment of lost instruments or records which have or should have their situs within the jurisdiction of the court;

Jurisdictional Statement

(7) In which there shall have been issued and executed any writ of replevin, garnishment or attachment;

(8) In which any other writ or process shall have been issued and executed so as to place any property, fund, or indebtedness in custodia legis;

(9) In scire facias to revive a judgment;

(10) In any other suit or proceeding, not hereinabove expressly mentioned, wherein personal service of process or notice is not required by the statutes or constitution of this state or by the Constitution of the United States.

48.02. Service of process by publication, upon whom.

Where personal service of process cannot be had, service of process by publication may be had upon any party, natural or corporate, known or unknown, including:

(1) Any known or unknown natural person, and, when described as such, the unknown spouse, heirs, devisees, grantees, creditors or other parties claiming by, through, under or against any known or unknown person who is known to be dead or is not known to be either dead or alive;

(2) Any corporation or other legal entity, whether its domicile be foreign, domestic or unknown, and whether dissolved or existing, including corporations or other legal entities not known to be dissolved or existing, and, when described as such, the unknown assigns, successors in interest, trustees, or any other party claiming by, through, under or against any named corporation or legal entity;

(3) Any group, firm, entity or persons who operate or do business, or have operated or done business, in this state, under a name or title which includes the word "corporation", "company," "incorporated,"

"inc." or any combination thereof, or under a name or title which indicates, tends to indicate or leads one to think that the same may be a corporation or other legal entity; and

(4) All claimants under any of such parties. Unknown parties may be proceeded against exclusively or together with other parties.

QUESTIONS PRESENTED BY THE APPEAL.

(c) The questions presented by the appeal are:

(i) Do the provisions of Chapter 48, Florida Statutes, Sections 48.01 and 48.02, violate the Constitution of the United States (in particular, Section 1 of the Fourteenth Amendment thereto) where said Statute is used by the Supreme Court of Florida as a basis for jurisdiction to decree the devolution of property outside its jurisdiction and in the hands of a trustee who was not personally served with process, who has not appeared in the proceedings and who has no place of business, has never conducted business and has no officers, agents or representatives in the State of Florida?

(ii) Do the provisions of Chapter 48, Florida Statutes, Sections 48.01 and 48.02, violate the Constitution of the United States (in particular, Section 1 of the Fourteenth Amendment thereto) where said Statute (in particular, 48.01 (5)) was used by the Supreme Court of Florida, under the guise of construing a *clear* and *unambiguous* will, for the sole purpose of declaring invalid an *inter vivos* trust whose situs, property and trustee were all outside the jurisdiction of the Court and whose trustee was not personally served with process and did not appear in the proceedings?

(iii) Does the refusal of the Supreme Court of Florida to give full faith and credit to the judgment of the Court of Chancery of the State of Delaware and the Supreme

Court of the State of Delaware, both courts of competent jurisdiction, having control over the trust res, the trustees and all of the beneficiaries of the trust contravene the Constitution of the United States (in particular, Section 1 of Article IV thereof)?

(iv) Did the Supreme Court of Florida err in refusing to apply the law of Delaware in determining the validity of a trust having its situs in Delaware?

(v) Did the Supreme Court of Florida err in holding that the *inter vivos* trust agreement was valid insofar as it created a beneficial life estate in the settlor and that it was republished in Florida so as to become subject to jurisdiction of the Florida Courts for the sole purpose of decreeing its invalidity?

(vi) Did the Supreme Court of Florida err in reaching a conclusion which is totally lacking in comity and is unenforceable in the face of the mandates of the Court of Chancery of the State of Delaware and the Supreme Court of the State of Delaware?

STATEMENT OF THE CASE.

(d) This action was brought for the purpose of determining the validity of the exercise of a power of appointment reserved in an *inter vivos* trust created in Delaware by agreement dated March 25, 1935, between Dora Browning Donner, then a resident of the State of Pennsylvania, and Wilmington Trust Company, a banking corporation of the State of Delaware, having its principal place of business in Wilmington, Delaware, as Trustee (T. 20). On December 3, 1949, after Mrs. Donner had moved to and become a resident of the State of Florida, she executed (and later amended under date of July 5, 1950) her reserved power of appointment (T. 37), appointing the trust funds as follows: \$200,000 to each of two trusts for the benefit of Joseph Donner Winsor and Donner Hanson, two of the Appellants

herein, of which Delaware Trust Company, a banking corporation of the State of Delaware, having its principal place of business in Wilmington, Delaware, is Trustee; \$10,000 to the Bryn Mawr (Pennsylvania) Hospital; an aggregate of \$7,000 to six employees (all non-residents of the State of Florida); and the residue to Elizabeth Donner Hanson, one of the Appellants herein, "as the Executrix of [her] Last Will and Testament to be dealt with by her in accordance with the terms and conditions of said Last Will and Testament * * *".

In her Will, executed on the same day as this power, after disposing of her tangible personal property and directing her Executrix to pay out of her estate "all estate, inheritance, transfer or other succession or death duties, State and Federal, which by reason of [her] death shall become payable upon or with respect to the property appointed by [her] by the exercise of the power of appointment provided in [her] favor in paragraph 1 of a certain trust agreement entered into between [her] and Wilmington Trust Company, a Delaware corporation, as Trustee on the 25th day of March, 1935", she bequeathed one-half of the remainder to Delaware Trust Company as Trustee under a third trust for the benefit of Katherine N. R. Denekla, one of the original Plaintiffs and an Appellee in this action, and the remaining one-half to Elizabeth Donner Hanson, as Trustee of a trust created by said Will for the benefit of Dorothy B. Rodgers Stewart, who through her guardian, Elwyn L. Middleton, is the remaining original Plaintiff and Appellee in this action (T. 14).

Mrs. Donner died on November 20, 1952, and her Will was probated in Palm Beach County, Florida (T. 5).

Wilmington Trust Company, in obedience to the direction of the power of appointment dated December 3, 1949 to pay over the trust fund "as soon as conveniently may be", between January 7, 1953 and February 11, 1953, paid Bryn Mawr Hospital the \$10,000 appointed to it and the six employees the \$7,000 appointed to them. On March 30,

1953, it delivered to Delaware Trust Company, Trustee of the two trusts for Joseph Donner Winsor and Donner Hanson, securities and cash in the amount of \$200,000 for each trust. Wilmington Trust Company continues to hold the residue of the trust estate for the account of the Executrix (T. 132). None of the trust assets have ever been in the State of Florida and neither of the Trust Companies has any office, officers, agents or representatives, or does any business, in that State (T. 129, 130).

After this distribution and after the expiration of the time period within which the Trustee was ordered to make distribution, namely, "not later than twelve months after * * * [Mrs. Donner's] death" (November 20, 1953), Appellees on January 22, 1954 filed this action in the Circuit Court of Palm Beach County, for a determination and declaration "of what portion of the trust property * * * passes under the residuary clause of the will of the decedent". Appellants, all being residents of the State of Florida, were personally served with process and appeared herein through their attorneys. Three of the servants who were appointed to and paid a portion of the trust fund were not named as defendants. The Trust Companies, the Bryn Mawr Hospital and the remaining three servants, all being non-residents, could not be personally served and did not appear. Jurisdiction over them was attempted by constructive service under the provisions of Chapter 48, Florida Statutes, Sections 48.01 and 48.02 (T. 44, 47, 50).

Appellants filed a motion to dismiss the action on the grounds that the Circuit Court lacked jurisdiction over the subject matter of the action for the reasons, inter alia, (1) that none of the corporate defendants or trustees had offices, officers, agents or representatives, or did business, in the State of Florida and there was no res in the State of Florida which would constitute a legal basis for constructive service; (2) that the exercise of jurisdiction under the circumstances would contravene the Constitution and Laws of the State of Florida and the Constitution of the

United States, and, in particular, Section 1 of the Fourteenth Amendment to the United States Constitution; and (3) that the plaintiffs had failed to join and therefore the Court lacked jurisdiction over indispensable parties to the disposition of the suit (T. 47). After hearing, the Circuit Court on April 9, 1954, determined that:

"Though this suit is primarily concerned with the validity and effect of certain powers of appointment rather than the will, I am inclined to think that the matters sought to be presented by the motion filed February 18, 1954, can best be determined at final hearing." (T. 51)

"Ruling was therefore postponed *"until trial and final hearing"*.

Appellants petitioned the Supreme Court of Florida for certiorari, which was denied by order dated June 29, 1954 (T. 157).

Appellant, Elizabeth Donner Hanson, as Executrix and Trustee under Mr. Donner's will, then filed an action in the Court of Chancery of the State of Delaware, impleading all interested parties and after reporting to that Court that the complaint in this action charged her with having "failed to take any steps" to "capture" the trust assets, prayed that the Court "determine by declaratory judgment the persons entitled to participate in the assets held in trust by the Wilmington Trust Company * * *" and "enter decrees awarding said funds to the persons entitled thereto" (T. 72).

Appellants then filed their answer in this action appending a copy of the Delaware complaint and reporting to the Circuit Court of Palm Beach County that "intending to meet Plaintiffs' charge that [the Executrix] has failed to take steps to 'capture' assets belonging to said Estate and in order to expedite the final determination of the controversy raised by plaintiffs [she had] on the 28th day of July, 1954, filed in the Court of Chancery of the State

of Delaware, in and for New Castle County, a complaint for declaratory judgment against Wilmington Trust Company as Trustee, the Plaintiffs in this suit and others, asking the Court to determine the parties entitled to participate in the assets held in trust by Wilmington Trust Company * * *. Appellants' answer avers that the Delaware Court "is the only Court (1) having jurisdiction of the aforesaid trust, the Trustee and the trust assets; (2) which can appropriately and finally determine the validity of said exercise of powers of appointment and (3) whose decree would be entitled to full faith and credit under the Constitution of the United States" (T. 70). The answer renewed Appellants' charge that the Circuit Court of Palm Beach County lacked jurisdiction to finally determine the questions raised by the complaint and prayed that the proceedings be stayed pending the determination of the Delaware Court (T. 68).

On August 25, 1954, the Circuit Court of Palm Beach County denied Appellants' motion for a stay and Appellants again petitioned the Supreme Court of Florida for a writ of certiorari to review said action (T. 168). This was denied by order of that Court dated November 23, 1954.

Appellees and Appellants both filed motions for a Summary Final Decree on the record. Argument was heard by the Circuit Court of Palm Beach County on January 5, 1955, and on January 14, 1955, the Court filed its "Summary Final Decree" holding:

"As to jurisdiction, the trust assets and the trustee are in Delaware. No personal service has been had upon the defendants who failed to answer * * *. Hence this Court considers that it has no jurisdiction over the non-answering defendants" (T. 138).

The Court thereupon dismissed the action as to the non-answering defendants, but proceeded to hold that "as to the parties now before the Court, the assets held under the provisions of the trust agreement dated March 25,

1935, between the decedent, Dora Browning Donner, and the Wilmington Trust Company, as Trustee, and additions thereto passed under the Will of Dora Browning Donner, dated December 3, 1949, and disposition thereof is determined by the residuary clause of said will * * * (T. 139).

Appellants petitioned for rehearing primarily on the ground that the Court having found that it lacked jurisdiction over the trustees and over the trust res was necessarily prevented from finally and effectively determining the litigation (T. 140). This petition was denied by order of the Court dated March 3, 1955, after which both Appellants and Appellees appealed to the Supreme Court of Florida (T. 148).

On December 28, 1955, the Court of Chancery of the State of Delaware, after hearing the parties in the action pending before it, and after giving consideration to the proceedings and "Summary Final Decree" of the Circuit Court for Palm Beach County, ruled in an opinion:

1. "Since the purported Trust was created in Delaware and since the assets have been held by the Trustee in Delaware at all times, the 'home' of the Trust is in Delaware and its validity must be determined by the law of Delaware". (T. 191) (119 A. 2d 907).
2. "It is held that the Agreement of 1935 created a valid *inter vivos* Trust. Since the Trust was valid the exercise of the powers of appointment thereunder by the instruments of 1949 and 1950 were valid * * *. Accordingly, the distributions by Wilmington Trust Company constituted a proper discharge of its duties as Trustee under the Agreement with Mrs. Donner." (T. 201) (119 A. 2d 911).

On January 13, 1955, the Delaware Court entered its final decree which by its terms binds all parties to the litigation, who include all parties to this action, to the declarations, adjudications and determinations thereof (T. 203).

Appellants then filed in the Supreme Court of Florida a petition requesting the Court to remand the action to the Circuit Court with instructions to dismiss upon the basis of the opinion and order of the Delaware Court, copies of which were attached (T. 175). Said petition recited that a petition for rehearing by certain of the defendants in the Delaware litigation urging that the Court give full faith and credit to the "Summary Final Decree" of the Circuit Court of Palm Beach County had been denied after hearing.

Argument on the motion to remand was heard by the Supreme Court of Florida on March 27, 1956, at the same time as the hearing on the appeals.

On September 19, 1956, the Supreme Court of Florida filed its opinion denying said motion to remand and holding that the Circuit Court had jurisdiction of all of the defendants named in this action and that the appointments of the trust property were invalid although the trust itself was valid (T. 239).

Appellants filed a petition for rehearing particularly directing the Court's attention to the questions presented by this appeal as set forth in paragraph (c) hereof (T. 257). This petition was denied on November 28, 1956 (T. 272) and on the same day the Court granted Appellants' petition to stay its mandate pending the completion of its appeal to this Court (T. 277).

On January 14, 1957, the Supreme Court of the State of Delaware (128 A. 2d 819) affirmed the Court of Chancery of that State (T. 283) (18a). A petition for reargument, or, in the alternative for a stay of the mandate of the Delaware Supreme Court to permit appellants to petition this Court for a writ of certiorari, was settled by order of that Court dated February 7, 1957, denying the reargument and granting the stay (44a).

On January 25, 1957, Appellants filed with the Supreme Court of Florida a motion for leave to file an Extraordinary

Petition for Rehearing, based on the final determination of the Delaware Supreme Court, attaching a copy of its opinion to the petition. The Supreme Court of Florida dismissed this motion by order dated February 18, 1957 (T. 323).

THE FEDERAL QUESTIONS ARE SUBSTANTIAL.

(e) Appellants contend that the Federal questions presented by this appeal are substantial upon the following grounds:

(i) (1.) The application of Chapter 48, Florida Statutes, Sections 48.01 and 48.02, to acquire jurisdiction over the nonresident trustee and appointees in this case is a direct violation of the provisions of the Fourteenth Amendment to the Constitution of the United States. This is aptly stated by the Supreme Court of the State of Delaware in its opinion in *Lewis v. Hanson, supra*, as follows:

“ * * * To hold that in the absence of jurisdiction over the *res* in controversy Florida can compel appearance through substituted service would be a violation of the due process clause of the 14th Amendment. *Pennoyer v. Neff*, 95 U. S. 714, 24 L. Ed. 565.” (128 A.2d 834)

In so holding, the Delaware Court merely underscored the ruling of the Florida Chancellor, who, having found that “the trust assets and the trustee are in Delaware” and that “no personal service has been made upon the defendants who failed to answer,” dismissed the case as to them for want of jurisdiction.

(2.) The Delaware Supreme Court also properly held that the trustee was an indispensable party to the litigation, saying:

“Furthermore, we think it the law that while a *cestui que trust* is bound in most circumstances by an adjudication against his trustee, Iowa-Wisconsin

Bridge Co. v. Phoenix Finance Corp., supra, the converse of that proposition is not the law, particularly when the adjudication affects the existence of the trust itself. It is the duty of a trustee to defend the existence of his trust, 2 Scott on Trusts, § 178, even against an attempt by the settlor and sole beneficiary to overthrow it. Cf. Weymouth v. Delaware Trust Co., 29 Del. Ch. 1, 45 A. 2d 427. A trustee is also an indispensable party to a suit involving the trust property, and in defense of title to the trust property. 54 Am. Jur., Trusts, § 584." (128 A. 2d 834)

(ii) Nor can the Florida Supreme Court justify its jurisdiction by paragraph (5) of Section 48.01 of Chapter 48, Florida Statutes, on the ground that a will is involved and that the will is the *res*. The will is clear and unambiguous, is conceded to be valid, has been admitted to probate and needs no interpretation or construction. The nonresident trustee and appointees are not named as beneficiaries in the will and could have no interest or reason to appear in an action for its construction. For the Supreme Court of Florida to usurp jurisdiction on the basis of paragraph (5) is, we submit, justifiable ground for the conclusion of the Supreme Court of the State of Delaware that the Florida Court had "at best only a shadowy pretense of jurisdiction" (128 A. 2d 835). The action is, as was properly found by the Florida Chancellor in his early pronouncement in the proceedings, "primarily concerned with the validity and effect of certain powers of appointment, rather than the will * * *." (T. 52)

(iii) The Supreme Court of Florida, presumably again attempting to improperly apply Chapter 48, Florida Statutes, Section 48.01 (5), under the guise of the construction of a "written instrument" rather than the "will", resorted to "boot strap lifting" in determining that the trust agreement was valid insofar as it created a valid life estate for Mrs. Donner's benefit and was re-published by her after

she became a resident of Florida, in order to obtain jurisdiction to declare the trust invalid.

Consequently, since there was no personal service or appearance by the nonresident trustee and the appointees, since no trust *res* was ever in Florida which would form the basis for substituted service, since there is no basis for a declaratory decree on the validity, construction, or enforcement of the will, and since the Supreme Court of Florida cannot make the trust a valid Florida trust for the purpose of conferring jurisdiction to destroy it, the attempts of the Court to assume jurisdiction must necessarily violate the Fourteenth Amendment.

(iv) The refusal of the Supreme Court of Florida to give full faith and credit to the judgments of the Delaware Court of Chancery and Supreme Court violates Article IV of the Constitution of the United States. The Delaware Courts, both courts of competent jurisdiction, having control over the trust *res*, the trustee, and also of the beneficiaries, have decreed in the words of Mr. Justice Wolcott, speaking for the Supreme Court:

“* * * that the agreement of 1935 under the law of Delaware created a valid *inter vivos* trust. Under the law of Delaware, also, we think Wilmington Trust Company was required to transfer the trust assets pursuant to the directions contained in Mrs. Donner's exercise of the power of appointment delivered to it prior to her death.” (128 A. 2d 829)

This judgment is binding not only on the parties to the Florida action, but also on the Florida Courts.

(v) The Delaware Court of Chancery and Supreme Court determined that since the trust *res*, the trustee, the administration of the trust, and all of the beneficiaries were in the State of Delaware, and since the trustor evidenced a manifest intention to have Delaware law govern the trust, all questions having to do with the validity and adminis-

tration of the trust must be resolved by Delaware law. In this respect, the Supreme Court concluded:

"We, therefore, hold that the law of Delaware determines the essential validity of this trust agreement and of the exercise of the power of appointment." (128 A. 2d 826)

In its failure to follow the recognized principle of conflicts of law that the law of the situs of a trust controls and to apply that law, the Supreme Court of Florida denied to the trustee, appointees and appellants their right to due process of law. See *Home Life Insurance Co. v. Dick, supra*.

(vi) The Supreme Court of Florida erred in reaching a conclusion which is totally lacking in comity and is unenforceable in the face of the mandate of the Court of Chancery and the Supreme Court of the State of Delaware. The Supreme Court found that the public policy of the State of Delaware compelled it to ignore the findings of the Florida Court saying:

"Finally, we think the public policy of Delaware precludes its courts from giving any effect at all to the Florida judgment of invalidity of the 1935 trust. We are dealing with a Delaware trust. The trust *res* and trustee are located in Delaware. The entire administration of the trust has been in Delaware. The attack on the validity of this trust raises a question of first impression in Delaware and one of great importance in our law of trusts. To give effect to the Florida judgment would be to permit a sister state to subject a Delaware trust and a Delaware trustee to a rule of law diametrically opposed to the Delaware law. It is our duty to apply Delaware law to controversies involving property located in Delaware, and not to relinquish that duty to the courts of a state having at

best only a shadowy pretense of jurisdiction. Cf. *Taylor v. Crosson*, 11 Del. Ch. 145, 98 A. 375." (128 A. 2d 835)

The converse is true. Comity requires the Courts of Florida to recognize the Delaware Courts' direct and primary authority over property and persons within its jurisdiction.

Finally, we submit that this Court should resolve the questions raised in this action in which the Courts of the States of Florida and Delaware are diametrically opposed in their application of the substantive law and thereby put an end to further litigation. Such litigation to surcharge appellant, Elizabeth Donner Hanson, for failure to "capture assets" has been threatened throughout these proceedings. But when she attempted to obtain these assets by her interpleader action in the Court of Chancery of the State of Delaware, the only court of competent jurisdiction for that purpose, the Florida Chancellor, at Appellees' insistence, enjoined her. Any litigation to so surcharge Mrs. Hanson must eventually find its way back to this Court if the questions herein presented are not presently resolved in this action.

OPINIONS AND ORDERS APPENDED.

(f) The following are appended hereto:

(i) Summary Final Decree of the Circuit Court for the Fifteenth Judicial Circuit in and for Palm Beach County dated January 14, 1955 (1a).

(ii) Opinion of the Supreme Court of Florida dated September 19, 1956 (4a).

(iii) Order of the Supreme Court of Florida denying Appellants' Petition for Rehearing dated November 28, 1956 (17a).

(iv). Opinion of the Supreme Court of the State of Delaware dated January 14, 1957 (18a).

(v) Order of Supreme Court of the State of Delaware denying petition for reargument and granting to Appellants in that Court a stay of its mandate to permit them to petition this Court for a writ of certiorari, dated February 7, 1957 (44a).

Respectfully submitted,

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Appendix.

CHANC ORDERS 234 PAGE 632

IN THE CIRCUIT COURT OF THE FIFTEENTH JUDICIAL CIRCUIT
OF FLORIDA, IN AND FOR PALM BEACH COUNTY. IN
CHANCERY.

KATHERINE N. R. DENCKLA, ETC., ET AL.,

Plaintiffs,

v.

WILMINGTON TRUST COMPANY, a Delaware
Corporation, et al.,

Defendants.

No. 31,980,

SUMMARY FINAL DECREE.

This cause was duly presented by counsel for the parties upon Motion for Summary Final Decree filed by plaintiff November 19, 1954 and Motion for Summary Decree filed by certain defendants on December 3, 1954.

Only questions of law are presented. The facts are simple and undisputed. No useful purpose would be served in stating them.

Two principal questions are presented, first, jurisdiction as against those whom a decree pro confesso has been entered; secondly, the authority of an executrix of a Florida will concerning certain assets now located in Delaware and purported to be held under a declaration of trust and power of appointment executed by the testator.

As to jurisdiction, the trust assets and the trustees are in Delaware. No personal service has been had upon the defendants who failed to answer. The inclusion of the trust assets in her inventory, and an allowance of counsel fees and compensation for the executrix, although such an inclusion was later sought to be withdrawn, does not of itself give this court jurisdiction over these assets in Dela-

ware or the Trustees. Hence, this court considers that it has no jurisdiction over the non-answering defendants.

Concerning the declaration of trust dated March 25, 1935, and particularly the power of appointment dated December 3, 1949, no present interest passed to any beneficiary other than the Trustor (Testatrix). It seems clear to me, from the authorities, that the power of appointment was testamentary in character and did not constitute a valid inter vivos trust appointment. As the appointment had only one subscribing witness, rather than two, as required in Florida, it did not constitute a valid testamentary disposition. Hence, the executrix should receive the assets and dispose of them agreeable to the will under which she was appointed.

THEREUPON, IT IS ORDERED that this cause be dismissed, without prejudice, as to the non-answering defendants; that the Motion filed February 18, 1954, and the Motions for Summary Final Decree be granted to the extent embraced in this decree, and in other respects denied.

IT IS FURTHER ORDERED AND DECREED that, as to the parties now before the court, the assets held under the provisions of the trust agreement dated March 25, 1935, between the decedent, Dora Browning Donner, and Wilmington Trust Company, as Trustee, and additions thereto, passed under the will of Dora Browning Donner, dated December 3, 1949, and disposition thereof is determined by the residuary clause of the will, which was admitted to probate in the County Judge's Court, in Palm Beach County, December 23, 1952.

IT IS FURTHER ORDERED that this court retain jurisdiction for the purpose of enforcing this decree and the settlement of any other questions that may properly arise in connection herewith, all with costs taxed against the executrix.

Copy furnished counsel.

DONE AND ORDERED this 14 day of January, A. D. 1955.

C. E. CHILLINGWORTH,

Circuit Judge.

STATE OF FLORIDA,
COUNTY OF PALM BEACH,

I HEREBY CERTIFY that the above and foregoing is a true and correct copy of a SUMMARY FINAL DECREE filed in my office on the 14 day of Jan., A. D. 1955, and recorded in CHANCERY ORDER Book 234 at page 632.

WITNESS my hand and official seal this 17 day of Jan.,
A. D. 1955.

J. ALEX ARNETTE,

Clerk of Circuit Court.

By /s/ MAMIE L. HARMAN,

Deputy Clerk.

(Seal)

Filed this 14th day of January, 1955 at 2:00 P. M. and
recorded in CHANCERY ORDER BOOK; No. 234 at Page 632.
Record verified.

J. ALEX ARNETTE,

Clerk.

By: THADDIE P. PLANT, D. C.

IN THE SUPREME COURT OF FLORIDA

JUNE TERM, A. D. 1956

SPECIAL DIVISION A.

ELIZABETH DONNER HANSON, Individually
and as Executrix, et al.,*Appellants,**v.*KATHERINE N. R. DENCKLA, Individually,
et al.,*Appellees.*

Case No. 27,622

OPINION.

Opinion filed September 19, 1956.

An Appeal from the Circuit Court for Palm Beach County,
C. E. Chillingworth, Judge.

Caldwell, Pacetti, Robinson & Foster and Manley P. Caldwell for Elizabeth Donner Hanson, Individually, as Executrix of the Will of Dora Browning Donner, Deceased, as Guardian Ad Litem for Joseph Donner Winsor and Donner Hanson and William Donner Roosevelt, Individually; McCarthy, Lane & Adams, Edward McCarthy and William H. Foulk (Wilmington, Delaware) for Elizabeth Donner Hanson as Guardian Ad Litem for Joseph Donner Winsor and Donner Hanson, Appellants.

C. Robert Burns and Redfearn & Ferrell, for Appellees.

HOBSON, J.:

This is an appeal by defendants from a summary final decree holding that assets of a trust created by Dora Donner during her lifetime passed under her will. Cross-

assignments of error have been filed by the plaintiffs, who contend that the chancellor erred in holding that he had no jurisdiction over some of the defendants, the trustee and certain beneficiaries under the trust, who did not answer the complaint.

The essential facts of the case are not in dispute. Dora Donner died in Palm Beach, Florida, on November 20, 1952, leaving a will dated December 3, 1949, which was probated in Palm Beach County. She was formerly a citizen of Pennsylvania, but made her permanent home in Palm Beach County on or about January 15, 1944, and remained domiciled in Florida until she died.

On March 25, 1935, the testatrix executed a trust instrument in which she named the Wilmington Trust Company, a Delaware corporation, as trustee. The trust instrument provided in part as follows:

"Trustee shall pay over the net income of the trust fund unto Trustor, for and during the term of her natural life. Upon the death of Trustor Trustee shall assign, transfer, convey and deliver this trust fund, principal and undistributed income thereof, if any, free from this trust, unto such person or persons and in such manner and amounts and upon such trusts, terms and conditions as Trustor shall have appointed by the last instrument in writing which she shall have executed and delivered to Trustee, or failing such instrument, by her last Will and Testament, or in default of any such appointment then unto the then living issue of Trustor, per stirpes and not per capita."

The trust assets consisted entirely of intangible personalty.

On April 6, 1935, Mrs. Donner executed a power of appointment under the terms of the trust. On October 11, 1939, she executed a new power of appointment, amending the previous power.

On December 3, 1949, (the same day she executed her will, and while domiciled in Florida) Mrs. Donner executed

an instrument entitled "DONNER * FIRST POWER OF APPOINTMENT" wherein she revoked all previous exercises of the power of appointment under the trust and ordered that certain sums be paid to a different set of beneficiaries.

On July 7, 1950, she executed an instrument entitled "DONNER * SECOND POWER OF APPOINTMENT" amending the instrument of December 3, 1949. This was the last "power of appointment" the testatrix exercised before her death.

In her will, after making certain specific directions and bequests, the testatrix provided in part as follows:

"FIFTH: All the rest, residue and remainder of my estate, real personal and mixed, whatsoever and where-soever the same may be at the time of my death, *including any and all property, rights and interest over which I may have power of appointment which prior to my death has not been effectively exercised by me* or has been exercised by me in favor of my Executrix, I direct my Executrix to deal with as follows, namely:"
[Here follow certain directions and the names of residuary legatees, plaintiff-appellees here.] (Emphasis supplied.)

The complaint for declaratory decree in this case was filed for the purpose of determining what passes under the residuary clause of the will quoted above. This determination, of course, requires a study of the trust agreement of March 25, 1935, and the powers of appointment exercised thereunder, to determine whether or not such powers as the testatrix had were "effectively exercised" under the terms of the will. On this issue, the chancellor held in part:

"Concerning the declaration of trust dated March 25, 1935, and particularly the power of appointment dated December 3, 1949, no present interest passed to any beneficiary other than the Trustor (Testatrix). It seems clear to me, from the authorities, that the power of appointment was testamentary in character

and did not constitute a valid inter vivos trust appointment. As the appointment had only one subscribing witness, rather than two, as required in Florida, it did not constitute a valid testamentary disposition. Hence, the executrix should receive the assets and dispose of them agreeable to the will under which she was appointed."

After this final decree was entered, a suit which had been brought in Delaware by Elizabeth Donner Hanson, executrix and trustee under the Donner will (one of the appellants herein) to determine the validity of the trust agreement resulted in a summary judgment of the Court of Chancery of the State of Delaware in and for New Castle County, holding that the trust was valid. An appeal from this judgment is pending in Delaware but, so far as the record here before us shows, has not yet been determined.

Appellants have lodged with us a copy of the Delaware chancellor's opinion and judgment and, on the basis thereof, have moved to remand the instant case with directions to dismiss it, taking the position that the Delaware judgment is dispositive of the main issue raised on this appeal.

We shall first consider the contention of appellants that the circuit court of Palm Beach County erred in holding the trust and the powers of appointment exercised thereunder invalid as testamentary in character. As a preliminary inquiry, it is necessary to determine whether or not jurisdiction existed in the courts of Florida to pass upon the validity of these instruments.

There can be no doubt that the court below possessed substantive jurisdiction to determine this issue. Jurisdiction existed by virtue of the will, which had been duly probated in Florida, the testatrix' domiciliary state. Reference having been made in the will, as we have seen, to powers of appointment, and the question of effective exercise thereof having been properly raised, the chancellor

below had no alternative but to examine the trust instrument and documents executed thereunder and declare them valid or invalid. This is to be distinguished from a case wherein questions of administration or validity of a purported inter vivos trust arise absent a will or any reference therein. Cf. *Wilmington Trust Co. v. Wilmington Trust Co.*, Del., 24 A. 2d 309, wherein the settlor had executed a will "making no reference whatever to the power of appointment conferred on him by the [previously executed] trust agreement . . ." and it was held that the Delaware courts had jurisdiction to determine the validity of trust powers, although the settlor died a domiciliary of another state. In the case now presented, it would have been an abdication or abandonment of jurisdiction, which we would have been obliged to correct, if the chancellor below had failed to answer the question which was duly brought before him for adjudication.

The next question is the source of the applicable law to test the validity of the attempted trust disposition. The trustee, Wilmington Trust Company, is a Delaware corporation with its principal place of business in Delaware. Securities representing the intangible personalty which forms the corpus of the trust are also located in Delaware. The settlor was domiciled in Pennsylvania when she executed the original trust instrument. The first two "powers of appointment", now revoked, were executed while the settlor was domiciled in Pennsylvania. But these considerations alone are insufficient to persuade us that the law of either Delaware or Pennsylvania is applicable, for reasons which will hereinafter appear.

Assuming, for the moment, that this was an inter vivos trust, the only exercises of the power of appointment which could have been intended to create an interest to be enjoyed at the settlor's death were those reflected in the documents of 1949 and 1950. The settlor obviously intended these documents, if any, to make the controlling disposition; for she revoked all previous exercises of the

power and even called the 1949 and 1950 papers the "first" and "second" power of appointment respectively, although she had previously executed similar instruments. The chancellor in Delaware, in expressing his opinion that the trust was valid under Delaware law, sanctioned payment to the remaindermen named in these last two powers of appointment. In the last analysis we, too, are concerned with the interests of these remaindermen in our inquiry as to whether or not the instruments which created their interests were effective to shift the trust property out of the estate of the testatrix. We do not question the validity of the beneficial life estate reserved by the settlor.

It is urged upon us that the remaindermen possessed during the life of the settlor a present right of (sic) future enjoyment of the trust property. In making this argument, appellants state in part in their brief that:

" . . . since the right to amend is specifically reserved in the Trust Agreement of March 25, 1935, *each appointment should be construed as an amendment to and a republication of the original agreement*. Therefore, the trust agreement and appointments thereunder must always be construed together." (Emphasis supplied.)

In *Henderson v. Usher*, 118 Fla. 688, 160 So. 9, we observed that an inter vivos trust usually has its situs at the residence of the creator of the trust, and we were considerably influenced in our consideration of this principle by the case of *Swetland v. Swetland*, 105 N. J. Eq. 608, 149 A. 50; Id., 107 N. J. Eq. 504, 153 A. 907, which we viewed as "one of the leading cases in this country on the question". In the *Swetland* case the settlor had amended the trust, but had been domiciled in New Jersey both at the time of his execution of the original trust agreement and the amendment thereto. It was held that New Jersey law applied to test both agreements. The court in the *Swetland* case rejected the contention that the applicable law as to the trust necessarily followed the settlor wherever he might be

domiciled after the trust was executed, and it is unnecessary for us to express any opinion regarding this principle. It is sufficient to observe that in the instant case the last effective acts, if any there were, of the settlor to establish remainder interests under the trust were accomplished while she was a Florida domiciliary, and we consider the last powers of appointment as a republication of the original trust instrument, or as if the trust instrument had been executed while the settlor was domiciled in Florida. We consider this a far more realistic interpretation of these instruments than if we were to rule that the last powers of appointment should be construed to relate back to the date upon which the original trust agreement was executed, because the effect of a "relation-back" view would be to establish an artificially early date for interests which were obviously not intended to be created by the settlor until much later. Hence we must consider the validity of the trust, and the remainder interests it sought to create, under Florida law, *Henderson v. Usher*, supra, 118 Fla. 688, 160 So. 9. Compare the rule sustaining the power of the domiciliary state to tax, and apply its tax law to, the exercise of a power to dispose of intangibles, although the trust fund and trustee are outside the state. *Graves v. Schmidlapp*, 315 U. S. 657, 86 L. Ed. 1097; *Bullen v. Wisconsin*, 240 U. S. 625, 60 L. Ed. 830.

The logic of the foregoing analysis is strongly buttressed in the instant case by the fact that the settlor chose, after she had come to Florida, which was to be her last domicile, to make an integrated pattern of arrangements for the disposition of her property. At this period of her life she desired to make final exercise of whatever powers she might have had under the earlier arrangement but was careful to provide in her will for the possible ineffectiveness of such exercise of power, making an unquestionably valid testamentary disposition to settle her entire estate if the doubtful powers of appointment failed.

Having decided that Florida law applies, we are next obliged to apply it. The validity of an attempted inter vivos trust such as this is a matter of first impression in this state. The trust instrument provided, as we have seen, that the settlor would receive all of the net income for life. The settlor reserved to herself the right to amend or revoke the trust agreement in whole or in part at any time. Many powers of the trustee could ordinarily be exercised by it only upon the written direction of, or with the written consent of, the "adviser" of the trust. These powers were the following:

"(b) To sell at public or private sale, exchange for like or unlike property, convey, lease for terms longer or shorter than the trust, and otherwise dispose of any or all property, real or personal, held in the trust fund, for such price and upon such terms and credits as Trustee may deem proper.

"(c) To invest the proceeds of any such sale or sales, and any other money available for investment, in such stocks, bonds, notes, securities and/or other income producing property as may be deemed appropriate for this trust fund, irrespective of the rules of investment applying to trustees under any present or future laws of the State of Delaware or elsewhere.

. . .

"(e) To participate in any plan or proceeding for protecting or enforcing any right, obligation or interest arising from any stock, bond, note or security held in the trust fund, or for reorganizing, consolidating, merging or adjusting the finances of any corporation issuing the same, to accept in lieu thereof any new or substituted stocks, bonds and/or securities, to pay any assessment or any expense incident thereto, and to do any other act or thing that Trustee may deem necessary or advisable in connection therewith."

As "advisor" the settlor named her husband or "such other person or persons as trustor may nominate in writing delivered to trustee during her lifetime". Finally, and very significantly, the settlor reserved to herself the power of appointment, which we have discussed above, with a view to naming beneficiaries to take remainder interests in the trust after her death.

Although any of these reservations of power in the settlor, standing alone, might not have been enough to render the trust invalid (cf. *Williams v. Collier*, 120 Fla. 248, 162 So. 868, wherein we upheld a revocable trust reserving a life interest to the settlor, with remainder payable to named grandchildren) the cumulative effect of the reservations was such that the relationship established divested the settlor of virtually none of her day-to-day control over the property or the power to dispose of it on her death, and the trust was illusory. See *Burns v. Turnbull*, 294 N. Y. 889, 62 N. E. 2d 785; *In re Tuinnell's Estate*, 325 Pa. 554, 190 A. 906; *In re Shapley*, 353 Pa. 499, 46 A. 2d 227; *Hurley's Estate*, 17 Pa. D. & C. 637; *Warsco v. Oshkosh Savings & Trust Co.*, 183 Wis. 156, 196 N. W. 829; *Steinke v. Sztanka*, 364 Ill. 324, 4 N. E. 2d 472. In Scott, Trusts and the Statute of Wills, 43 Harv. L. R. 521, 529, the author states:

"Suppose that the settlor reserves not merely a life interest and a power to revoke the trust in whole or in part and to modify the trust, but reserves also a power to control the trustee in the administration of the trust. In such a case, there is authority to the effect that the trust is in substance testamentary and is invalid unless declared in an instrument executed in accordance with the requirements of the Statute of Wills."

Another common principle is reflected in Restatement of Trusts, Sec. 56, which reads as follows:

"Where the owner of property purports to create a trust inter vivos but no interest passes to the bene-

ficiary before the death of the settlor, the intended trust is a testamentary trust and is invalid unless the requirements of the statutes relating to the validity of wills are complied with."

Appellants contend that Illustration 8 under Subsection g. of this section is "exactly our case". This illustration reads as follows:

"8. A transfers certain securities to B in trust to pay the income to A for life and upon A's death to convey the securities to such person as may be designated in a letter to be delivered by A to B on the following day. On the following day A delivers a letter to B designating C as the person entitled to receive the securities on A's death. A valid trust for C is created, since an interest passes to C during the life of A."

The above illustration represents the instant trust in some particulars, but is an oversimplification of the facts before us. It relates to a single exercise of a power of appointment, rather than frequently revoked and amended exercises of power, such as appear in the case before us, which would demonstrate that the settlor considered the appointments to be ambulatory in nature and exactly like successive wills or codicils in their operation. The illustration given, moreover, does not consider the element of control, which we have discussed above. This is treated in Sec. 57 of the Restatement, Subsection g. of which reads in part as follows;

"If the settlor reserves a beneficial life estate and power to revoke or modify the trust and such power to control the trustee as to the details of the administration of the trust that the trustee is his agent, the intended disposition so far as it is intended to take effect after his death is invalid unless the requirements of the Statute of Wills are complied with, but the intended trust is valid so far as the beneficial life estate of the settlor is concerned."

Illustration 5 reads as follows:

"5. A, the owner of shares of stock, delivers the certificates to the B Trust Company to hold and deal with as custodian, to receive the income and pay it over to A, and with power to sell the shares and to reinvest the proceeds. In order to carry out these purposes the shares are registered in the name of the trust company. A writes a letter to the trust company directing it to convey the shares on A's death to C, unless A should otherwise direct. A dies. The intended disposition in favor of C is testamentary, and C is not entitled to the shares unless the requirements of the Statute of Wills are complied with."

True it is that in the situation posed in Illustration 5 the action taken by A, the settlor, is somewhat less formal than the action taken by the settlor herein, and while this is a circumstance which would tend to uphold the validity of the instant trust, we do not consider it controlling when weighed against the multiple reservations of power we have discussed.

We reemphasize that we do not, and need not, hold that the reservation of the power of appointment, or any other factor standing alone, would suffice to invalidate the remainder interests sought to be created under this trust. It is enough to observe that if, as to the remaindermen, this trust is not invalid as an agency agreement, and testamentary as the court below found, it is difficult to understand what further control could be retained by a settlor to produce this result, and the principles to which we have alluded above would lose their meaning. We have been shown no error in the chancellor's ruling on this aspect of the case, which accordingly must be affirmed.

We next consider the contention made on the cross-appeal that the chancellor erred in ruling that he lacked jurisdiction over the persons of certain absent defendants, summoned to appear by constructive service of process.

These defendants were the trustee and persons who would benefit under the last power of appointment executed under the trust, and against the will. In *Henderson v. Usher*, supra, 160 So. 9, we upheld constructive service of a citizen of New York, although the trust "res", consisting entirely of intangible personalty, was physically located in New York, and the trust was administered there by the Chase National Bank of New York, as trustee. We held that constructive service was valid in that state of the record because substantive jurisdiction existed in the Florida court by virtue of construction of a will, which was also involved, the testator having been domiciled in Florida. We observed that it was not essential that the assets of the trust be physically in this state in order that constructive service be binding upon a non-resident where the problem presented to the court was to adjudicate, inter alia, the status of the securities incorporated in the trust estate and the rights of the non-resident therein. It is entirely consistent with the *Henderson* case to hold, as we do, that the court below erred in ruling that it lacked jurisdiction over the persons of the absent defendants. With this view of the case, we need not consider the contention of cross-appellees that the absent defendants are necessary parties under *Martinez v. Balbin*, Fla., 76 So. 2d 488.

Finally, we mention again the motion to remand on the basis of the decree of the Delaware court. Since we hold that we have jurisdiction of the matter presented, and that Florida law is exclusively applicable thereto, this motion must be denied.

Affirmed in part; reversed in part.

TERRELL, Acting Chief Justice, THORNAL and O'CONNELL,
JJ., concur.

IN THE SUPREME COURT OF FLORIDA: .

I, GUYTE P. McCORD, Clerk of the Supreme Court of Florida, do hereby certify that the above attached and twelve foregoing pages is a true and correct copy of the Opinion and Judgment of the Supreme Court of Florida in that certain cause recently pending in said Court wherein Elizabeth Donner Hanson, individually and as executrix, et al., were appellants; and Katherine N. R. Denekla, individually, et al., were appellees, which was filed in said Court on September 19th, 1956, all as the same appears among the records and files of my said office. This Opinion and Judgment will not become final until after fifteen days from the date of filing said Opinion as aforesaid and if a petition for rehearing is filed within said fifteen-day period it will not become final until the petition for rehearing is acted on and disposed of.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the Seal of the Supreme Court of Florida, at Tallahassee, the capital, on this the 21st day of September, A. D. 1956.

GUYTE P. McCORD,

*Clerk of the Supreme Court
of Florida.*

Order, Supreme Court, Florida

IN THE SUPREME COURT OF FLORIDA.

—
June Term, A. D. 1956.

Wednesday, November 28, 1956.

—
ELIZABETH DONNER HANSON, INDIVIDUALLY AND AS
EXECUTRIX, ET AL.,
Appellants

KATHERINE N. R. DENCKLA, INDIVIDUALLY, ET AL.,
Appellants

—
ORDER.

The petition for rehearing filed by the appellants in
above cause has been considered and said petition is denied.

A True Copy

Test:

/s/ GUYTON P. McCORD,

Clerk Supreme Court.

(Seal)

IN THE SUPREME COURT OF THE STATE OF DELAWARE.

No. 8, 1956.

DORA STEWART LEWIS, MARY WASHINGTON STEWART BORIE
and PAULA BROWNING DENCKLA,

Defendants Below, Appellants,

ELIZABETH DONNER HANSON, as Executrix and Trustee under the Last Will of Dora Browning Donner, deceased,
Plaintiff Below, Appellee,

WILMINGTON TRUST COMPANY, a Delaware corporation, as Trustee under three separate Agreements, (1) and (2) with William H. Donner dated March 18, 1932 and March 19, 1932, and (3) with Dora Browning Donner dated March 25, 1935,

Defendant Below, Appellee,

DELAWARE TRUST COMPANY, a Delaware corporation, as Trustee under three separate Agreements (1) with William H. Donner dated August 6, 1940, and (2) and (3) with Elizabeth Donner Hanson, both dated November 26, 1948,

Defendant Below, Appellee,

KATHERINE N. R. DENCKLA,

Defendant Below, Appellee,

ROBERT B. WALLS, ESQUIRE, Guardian ad litem for Dorothy B. R. Stewart and William Donner Denckla,

Defendant Below, Appellee,

ELWYN L. MIDDLETON, Guardian of the property of Dorothy B. R. STEWART, a mentally ill person,

Defendant Below, Appellee,

EDWIN D. STEEL, JR., ESQUIRE, Guardian ad litem for Joseph Donner Winsor, Curtin Winsor, Jr., and Donner Hanson,

Defendant Below, Appellee,

BRYN MAWR HOSPITAL, a Pennsylvania corporation, MIRIAM V. MOYER, JAMES SMITH, WALTER HAMILTON, DOROTHY A. DOYLE, RUTH BRENNER and MARY GLACKENS,

Defendants Below, Appellees,

LOUISVILLE TRUST COMPANY, a Kentucky corporation, as Trustee for Benedict H. Hanson, and as Trustee under agreements with William H. Donner,

Defendant Below, Appellee,

WILLIAM DONNER ROOSEVELT, JOHN STEWART and BENEDICT H. HANSON,

Defendants Below, Appellees

OPINION.

(January 14, 1957)

WOLCOTT and BRAMHALL, *Justices*, and CAREY, *Judge*, sitting.

Appeal from a judgment of the Court of Chancery of New Castle County.

Arthur G. Logan and Aubrey B. Lank, of Wilmington, for appellants.

Robert B. Walls, Jr., Guardian *ad litem* for Dorothy B. R. Stewart and William Donner Denckla, appellee *pro se*.

Caleb S. Layton, of Wilmington, for Wilmington Trust Company, appellee.

David F. Anderson, of Wilmington, for Delaware Trust Company, appellee.

Edwin D. Steel, Jr., Guardian *ad litem* for Joseph Donner Winsor, Curtin Winsor, Jr., and Donner Hanson, appellee *pro se*.

WOLCOTT, J.:

This appeal involves two fundamental questions: (1) Whether a purported *inter vivos* trust and the exercise of a power of appointment under it are valid or invalid; and (2) Whether the parties may litigate the question of validity in a Delaware court because of an adverse adjudication upon the point by a Florida court.

The action below, commenced by Elizabeth Donner Hanson¹ as the Florida executrix of the settlor's will and, also, in her capacity as trustee under the residuary clause of that will, seeks a declaratory judgment establishing the persons entitled to \$417,000 which was distributed by the *inter vivos* trustee pursuant to the exercise of the power of appointment.

The parties named as defendants in the action include Wilmington Trust Company, trustee under the trust agreement in question and, as such, the distributor of the \$417,000, Delaware Trust Company, trustee, the recipient of \$400,000 of the trust assets, the recipients of the balance of \$17,000, and all possible claimants of the trust corpus, either under the exercise of the power of appointment or under the settlor's Florida will.

The cause came up for decision below on four cross-motions for summary judgment. It will suffice to state that the defendants divide themselves into two contending groups. One group, which we will call the "Lewis Group", maintains that the trust agreement is invalid as an *inter vivos* trust instrument and that, accordingly, the exercise of the power of appointment was testamentary in character and, as such, ineffective under Florida law to pass any interest. The Lewis Group contends that the entire trust corpus comprises part of the Florida estate of the settlor and passes under her will.

1. Since its institution, she has been enjoined by the Florida court from prosecuting the action. Since that time, neither she nor her counsel has taken any part in the litigation.

The second group, which we will call the "Hanson Group" maintains that the trust agreement is valid and that, accordingly, the transfer of \$417,000 pursuant to the exercise of the appointment is legally sufficient to pass title. Needless to say, the adoption of the contention of one group will benefit it financially to the loss of the other.

The Acting Vice Chancellor granted summary judgment in favor of the Hanson Group, holding that the trust agreement was a valid *inter vivos* trust; that the exercise of the power of appointment was effective to pass title to the \$417,000, and that there was no estoppel resulting from the Florida judgment. From this decision the Lewis Group appeals.

The facts are not in dispute. On March 25, 1935, Dora Browning Donner (hereafter Mrs. Donner), then being a resident of Pennsylvania, entered into a trust agreement with Wilmington Trust Company and deposited certain securities with it as the trust corpus. By the terms of the agreement Wilmington Trust Company was directed to manage, invest and reinvest the trust corpus and to pay over the net income to Mrs. Donner for her life who reserved to herself a power of appointment of the corpus exercisable either by instrument or by will. Failing the exercise of the power, the agreement directed that the trust corpus be distributed by the trustee at her death to her issue surviving, or to her next of kin.

Specific powers were conferred upon Wilmington Trust Company, as trustee, which in substance were the ordinary powers granted to a trustee. However, it was specified that Wilmington Trust Company could exercise certain of the powers "only upon the written direction of, or with the written consent" of a trust advisor. These powers were (1) to sell trust assets, (2) to invest proceeds of sale of trust property, and (3) to participate in mergers and reorganizations of corporations whose securities were held as part of the trust assets.

In the agreement, Mrs. Donner designated a trust advisor and reserved the right to nominate other advisors at any time during her lifetime. She also reserved the right to amend, alter or revoke the agreement in whole or in part at any time, as well as the right to change from time to time the trustee. On one occasion, she withdrew \$75,000 from the trust corpus, which sum she later replaced:

On two different occasions prior to 1949, Mrs. Donner executed instruments exercising the power of appointment. Finally, on December 3, 1949,² by a non-testamentary instrument, she exercised the power of appointment, specifically revoking the earlier exercises by her of the power, and directing the Wilmington Trust Company, six months after her death, to pay over a total of \$17,000 to Bryn Mawr Hospital and certain family retainers, \$200,000 to Delaware Trust Company in trust for Joseph Donner Winsor, \$200,000 to Delaware Trust Company in trust for Donner Hanson, and the residue of the corpus to the executrix of her will.

In 1944, Mrs. Donner changed her residence from Pennsylvania to Palm Beach County, Florida where she was domiciled at her death in 1952. Her will was probated in Florida and Elizabeth Donner Hanson duly qualified as executrix. The residuary clause of her will directed her executrix to pay from the residuary estate, which specifically included the balance of the trust corpus not appointed in her lifetime, all death taxes on property appointed from the trust corpus during her lifetime, and to divide the balance remaining into two equal parts, one part to be transferred to Delaware Trust Company in trust for Katherine N. R. Denckla, a daughter; and the other part to be transferred to Elizabeth Donner Hanson in trust for Dorothy B. R. Stewart, another daughter, for her life, and upon her death to Delaware Trust Company in trust for Katherine Denckla.

² Later antedated in a minor aspect.

At the death of Mrs. Donner the trust corpus held by Wilmington Trust Company amounted to in excess of \$1,490,000. Thereafter, pursuant to the directions contained in the exercise of the power of appointment Wilmington Trust Company distributed assets in the aggregate amount of \$417,000 and transferred a portion of the balance of the corpus to the executrix of the will of Mrs. Donner.

In January, 1954 the two residuary beneficiaries under the will of Mrs. Donner³ brought an action for declaratory judgment in Palm Beach County, Florida against Mrs. Hanson, individually and as executrix, Wilmington Trust Company, Delaware Trust Company, and some of the other possible claimants to the assets passing under the residuary clause of the will of Mrs. Donner.⁴ In this action a judgment was sought determining what property passed under the will of Mrs. Donner, and the authority of the executrix over the assets held by Wilmington Trust Company under the 1935 agreement.

Neither Wilmington Trust Company nor Delaware Trust Company were served personally in the Florida action, nor did either of them appear. None of the trust assets held by Wilmington Trust Company has ever been held or administered in Florida, nor has Wilmington Trust Company ever done business in the State of Florida.

On January 14, 1955 the Circuit Court of Palm Beach County, Florida entered a decree⁵ holding that it lacked jurisdiction over the trust assets in Delaware and over Wilmington Trust Company, Delaware Trust Company and the other non-answering defendants, and directed that the complaint be dismissed without prejudice as to all of them. It was also held that no present interest passed to any

3. Katherine Denckla appeared in her own person. Dorothy Stewart appeared by a guardian.

4. Some of the family retainers, the recipients of a total of \$3,000 from the distribution pursuant to the exercise of the power of appointment, were not named as parties.

5. The Florida decree was entered after the instituting of suit in Delaware by the executrix.

beneficiary other than Mrs. Donner under the agreement of 1935 and that the exercise of the power of appointment by her was testamentary in character and, as such, invalid under Florida law because it was not subscribed by two witnesses. It was held, therefore, that the assets held by Wilmington Trust Company passed under the will of Mrs. Donner, and that the distribution thereof was to be made in accordance with the residuary clause.

Thereafter, an appeal was taken to the Supreme Court of Florida by the equivalent of the Hanson Group seeking a reversal of the holding of invalidity of the 1935 trust and the exercise of the power of appointment. Similarly, the equivalent of the Lewis Group by cross-appeal sought a reversal of the holding of lack of jurisdiction over Wilmington Trust Company and Delaware Trust Company.

The Supreme Court of Florida handed down its opinion (not yet reported) affirming that portion of the decree adjudging the invalidity of the trust and the exercise of the power of appointment, and reversing that portion of the decree holding that Florida had no jurisdiction over Wilmington Trust Company and Delaware Trust Company.

In the interim, while the appeal was pending in Florida, the Lewis Group perfected its appeal in this court from the judgment of the Acting Vice Chancellor and argued it before us.

In the argument and on the briefs, the main emphasis was placed by the Lewis Group upon the estopping effect of the Florida judgment. In deciding this appeal, however, we think a more logical approach to what has now become a headlong jurisdictional collision between states is to consider first the question of what law governs the basic validity of the trust agreement and the exercise of the power of appointment, and whether or not under the applicable law the instruments are legally effective as such. We therefore take up first the question of essential validity of the trust and the exercise of the power of appointment.

There is no dispute concerning the pertinent facts. Wilmington Trust Company at all times has done business in Delaware. The trust agreement was executed in Delaware. The assets comprising the trust corpus were delivered to Wilmington Trust Company and retained by it in Delaware. The trust was administered wholly within Delaware. At the time the agreement was executed, Mrs. Donner was a resident of Pennsylvania.

In determining the situs of a trust for the purpose of deciding what law is applicable to determine its validity, the most important facts to be considered are the intention of the creator of the trust, the domicile of the trustee, and the place in which the trust is administered. *Wilmington Trust Co. v. Wilmington Trust Co.*, 26 Del. Ch. 396, 24 A. 2d 309; *Wilmington Trust Co. v. Sloane*, 30 Del. Ch. 103, 54 A. 2d 544; *Annotation* 89 A. L. R. 1033.

Generally speaking, a creator of an *inter vivos* trust has some right of choice in the selection of the jurisdiction, the law of which will govern the administration of the trust. *Wilmington Trust Co. v. Wilmington Trust Co.*, *supra*. This trust agreement was signed and the securities delivered to a trustee doing business in Delaware. We think that this circumstance clearly indicates the intent of Mrs. Donner to have the trust administered and governed according to the law of Delaware. 1 *Beale, The Conflict of Laws*, 599.

Formerly, some courts emphasized the domicile of the settlor in deciding what law governed, but the more recent trend of decisions has placed considerably more emphasis on the location of the trust property and its place of administration. *Land, Trust in the Conflict of Laws*, § 23; 1A *Bogert, Trusts and Trustees*, § 211, p. 327; *Restatement, Conflict of Laws*, § 294(2). The manifest intention of Mrs. Donner to create a Delaware trust with a Delaware trustee, the deposit of the trust assets in Delaware, and the administration of the trust in Delaware, make it clear that the

situs of the trust created by the agreement of 1935 is Delaware, and that, therefore, its law determines its validity.

Not only is it the rule that the essential validity of an inter vivos trust having its situs in Delaware is governed by its law, but it is equally the rule that the validity of the exercise of a power of appointment reserved in such a trust agreement is to be determined in accordance with Delaware law. *Wilmington Trust Co. v. Wilmington Trust Co.*, supra; *Equitable Trust Co. v. Snader*, 17 Del. Ch. 203, 151 A. 712; *Land, Trusts in the Conflict of Laws*, § 24. This is so because the appointments made by the exercise of the power are regarded in law as though they had been embodied in the original trust instrument, and as such as having been created by it. *Wilmington Trust Co. v. Wilmington Trust Co.*, supra.

We, therefore, hold that the law of Delaware determines the essential validity of this trust agreement and of the exercise of the power of appointment.

We now reach the question of whether or not this particular trust instrument and the exercise of the power reserved in it are valid under Delaware law.

The Lewis Group first argues that the agreement of 1935 created no present interest in remainder, either vested or contingent, in anyone prior to the death of Mrs. Donner, and that, therefore, it was a testamentary disposition and, as such, invalid for failure to comply with the Florida statutes concerning wills. In support of the argument are cited 3 *Scott on Trusts*, § 330.4; 1 *Bogert on Trusts and Trustees*, § 103; and *Restatement, Trusts*, § 56. We recognize the rule but we think that it does not apply to the trust created by Mrs. Donner in 1935.

By that agreement Mrs. Donner reserved a life interest to herself, and directed that upon her death the corpus should be distributed as directed by the exercise of a reserved power of appointment. In the event she should die without having exercised the power it was directed that the

corpus should be distributed to her then living issue, *per stirpes*, and in default of living issue, to her next of kin.

We think that a present interest in remainder came into existence with the creation of the trust in 1935. That remainder interest was lodged in Mrs. Donner's issue upon condition they survived her. By the same token, Mrs. Donner's next of kin had an interest in remainder conditioned upon Mrs. Donner dying without leaving surviving issue. It is true that both of these remainder interests—whether vested or contingent makes no difference—were subject to defeasance by the exercise of the reserved power of appointment. That, however, does not mean that they were not present interests created in 1935. *Gray, The Rule Against Perpetuities*, (4th Ed.) § 112(3); *Restatement, Property, Future Interests*, § 157, comment R. Furthermore, the exercise of the power of appointment by Mrs. Donner by instrument in her lifetime created present interests in the beneficiaries of the appointment, and under the rule of *Wilmington Trust Co. v. Wilmington Trust Co.*, *supra*, these interests are regarded in law as having been embodied in the agreement of 1935. Accordingly, we are of the opinion that the trust is not testamentary in character for failure to create present interests in persons other than the settlor at the time it was created.

The Lewis Group next points to certain provisions of the trust agreement and contends that the effect of them is to destroy it as an effective *inter vivos* deed of trust. These provisions are: (1) The reservation by Mrs. Donner of all of the net income from the trust for her life; (2) The reservation by Mrs. Donner of the right to amend or revoke the trust agreement in whole or in part; (3) The reservation by Mrs. Donner of the right to change the trustee under the trust; (4) The reservation by Mrs. Donner of the right to designate and to change an investment advisor to the trustee; (5) The limitation placed upon the trustee to the effect that certain powers could be exercised only with the consent

of or at the direction of the trust advisor, and (6) The reservation by Mrs. Donner of the power to appoint the trust corpus either by *inter vivos* instrument in writing, or by last will and testament.

The Lewis Group contends that cumulatively the above recited provisions have the legal effect of creating an agency relationship between Mrs. Donner and Wilmington Trust Company. It is, therefore, argued that since the relationship was one of agency, the disposition of the trust corpus by Mrs. Donner through the purported exercise of her reserved power of appointment was testamentary in character, and, as such, invalid under the law of Florida in which state she had died domiciled.

The Lewis Group cites authorities to the effect that if a settlor retains large powers of control over trust property and a power to change the ultimate beneficiaries of the trust to such an extent that the trust is made as ambulatory as a will, under some circumstances it will not be sustained as a trust, upon the theory that it is a disguised attempt by the settlor to make a revokable disposition of property to take effect after death. The question comes down to whether or not the combined effect of the reserved powers is such as to leave the settlor virtually the owner of the property and the trustee a mere agent. See *Annotation*, 32 ALR(2) 1270.

In Delaware it has long been the law that the reservation of a life interest in trust income coupled with a power to revoke the trust and to dispose of the trust corpus by testamentary appointment will not make the trust testamentary in character. *Equitable Trust v. Paschall*, 13 Del. Ch. 87, 115 A. 356. Nor will the reservation of a power to change the trustee at the option of the settlor make it testamentary. *Wilmington Trust Co. v. Wilmington Trust Co.*, *supra*.⁶

6. This also seems to be the law in most jurisdictions. *United Bidg. & Loan Assn. v. Garrett*, (1946, D. C. Ark.) 64 F. Supp. 460; *Rose v. Rose*, 300 Mich. 73, 1 N. W. 2d 458; *Cleveland Tr. Co. v.*

However, the main thrust of the argument of the Lewis Group is directed to the provisions of the agreement providing for the designation of a trust advisor and the limitations on the power of the trustee to act only with the consent of or at the direction of the advisor.

By agreement, Mrs. Donner reserved the right to change the original advisor named and, in fact, she did so on two separate occasions. The agreement, however, specifically confines the powers of the trust advisor as limitations on the exercise of the trustee's powers to (1) the power to sell trust property; (2) the power to invest the proceeds of any sale of trust property, and (3) the power to participate in any plan of merger or reorganization of any company in which trust proceeds have been invested. With respect to the exercise of all of the other specific powers granted to the trustee the consent of the trust advisor is not required.

If it be assumed that the exercise by the trustee of the above enumerated powers had been conditioned solely upon the consent of Mrs. Donner herself, it is clear that that limitation would not have made the trust testamentary in character. *Restatement of Trusts*, § 57, Comment g; 1 *Scott on Trusts*, § 57.2; 1 *Bogert on Trusts and Trustees*, § 104; *National Shawmut Bank of Boston v. Joy*, 315 Mass. 457, 53 N. E. 2d 113. It follows logically, therefore, that if Mrs. Donner could have limited the power of the trustee to act only with her consent without making the trust testamentary, the same limitation could have been imposed by requiring the consent of a third party. In point of fact, the *National Shawmut Bank* case was precisely that situation, the power to control the investing of the trust funds

White, 134 Ohio State L. 15 N. E. 2d 627, 118 ALR 475; *Pickney v. City Bank Farmers Trust Co.*, 292 N. Y. S. 835; *Strause v. First Nat'l Bank of Ky.*, (Ky.) 245 S. W. 2d 914, 32 ALR 2d 126; *Leahy v. Old Colony Tr. Co.*, 326 Mass. 49, 93 N. E. 2d 238, 18 ALR 2d 1006; *City Bank Farmers Tr. Co. v. Charity Organization Society*, 265 N. Y. S. 267; *Farkas v. Williams*, 5 Ill. 2d 417, 125 N. E. 2d 600; See 1 *Scott on Trusts*, § 57.1.

having been conferred upon a third person. Furthermore, a trust advisor is a fiduciary, somewhat in the nature of a co-trustee, and is sometimes described as a quasi-trustee. *Gathright v. Gaut*, 276 Ky. 562, 124 S. W. 2d 782; *Restatement of Trusts*, § 185, Comment c; 2 *Scott on Trusts*, § 185. The resulting situation fundamentally is not unlike the appointment of co-trustees whose joint action is required in trust matters.

The agreement of 1935 by its terms reserves no power to Mrs. Donner herself over the control or management of the trust property, except such power as may come from her right to revoke the trust, change the trustee and change the advisor to the trustee. As far as the terms of the agreement itself are concerned, the trustee and the advisor were required to use their independent judgment in reaching decisions relating to the administration of the trust.

The terms of the agreement, therefore, do not compel the conclusion that Mrs. Donner retained such a measure of control over the management of the trust property that, as a matter of law, the Wilmington Trust Company and the trust advisor named were actually her agents. The entire management of the trust is vested by the terms of the instrument in the trustee and the advisor. We think, therefore, that under the law of Delaware the agreement of 1935 created a valid *inter vivos* trust and not an agency relationship as the Lewis Group contends.

The Lewis Group, however, urges that the history of operation of the trust by Wilmington Trust Company indicates clearly that Wilmington Trust Company was in fact a mere agent. To support this contention, affidavits and depositions were filed upon the theory that the agreement, itself, was ambiguous, and that the history of operation of the trust would be of assistance in resolving the ambiguity.

Such extrinsic evidence is material only in the event of ambiguity in the trust instrument itself. *Restatement of Trusts*, § 38. In our opinion, there is no ambiguity in this agreement. On the contrary, we think its provisions

are clear with respect to the acts of Wilmington Trust Company which required the consent of the trust advisor. The scheme used in drafting the agreement was to enumerate specific powers granted to Wilmington Trust Company, as trustee. It was then specifically directed that certain, but not all, of those powers should be exercised by Wilmington Trust Company only with the consent of or at the direction of the advisor of the trust. We think there is nothing ambiguous in this provision and that the requirement of consent of the trust advisor is confined to those specific powers. Consequently, we agree with the Acting Vice Chancellor that the evidence of the history of the trust administration is irrelevant.

In view, however, of the insistence of counsel upon the point, we will consider it, but we point out that in our opinion such consideration is unnecessary, and probably improper in the absence of an ambiguity in the instrument.

Generally speaking, the evidence discloses that Mrs. Donner named successively three different trust advisors, and that in administering the trust Wilmington Trust Company acted almost entirely in accordance with the directions of the trust advisor. We will assume, as they appear to do, that the affidavits support the contention of the Lewis Group that Wilmington Trust Company in all details of trust administration accepted unhesitatingly the directions of the advisor, and in fact exercised no independent judgment.

We have no doubt, however, that the voluntary giving up by a trustee of its independent functions as trustee to an advisor named in the trust instrument cannot operate to change the fundamental nature of the relationship created by the agreement. Such a voluntary failure to act as an independent trustee in those fields in which the agreement contemplated such action may be ground at the insistence of a beneficiary to remove the trustee but, certainly, it cannot change the relationship intended to be created by the trustor.

We note, also, that none of the facts supports at all the contention that Mrs. Donner, herself, had a hand in the management of the trust or made any of the decisions with respect to the internal management of the trust. Indeed, as far as the facts indicate, she knew nothing of the manner in which Wilmington Trust Company and the trust advisor were managing the affairs of the trust.

Assuming, therefore, that the evidence was material, a conclusion we expressly disclaim, nevertheless, there is no showing that Mrs. Donner retained any practical control of the management of the trust estate to the extent that the trustee and the trust advisor were thereby created her agents, with the consequence that, in law, the agreement of 1935 and the exercise of the power of appointment created by it were testamentary in character.

Our conclusion, therefore, is that the agreement of 1935 under the law of Delaware created a valid *inter vivos* trust. Under the law of Delaware, also, we think Wilmington Trust Company was required to transfer the trust assets pursuant to the directions contained in Mrs. Donner's exercise of the power of appointment delivered to it prior to her death.

The Lewis Group cites principally in support of its argument in this respect *In re Pengelly's Estate*, 374 Pa. 358, 97 A. 2d 844. The case, however, is of little aid to them. It was a suit brought by a widow, estranged from her husband for over forty years, to set aside a purported *inter vivos* trust which excluded her from any share in the husband's assets. The purported trust agreement transferred certain securities in trust and granted the trustee the right to invest trust assets "with the approval of the settlor during his lifetime." By the agreement the settlor reserved the income for life, and disposed of the corpus after his death in a manner to exclude his widow.

The court, in its opinion, states the fact to be that the trust agreement was in effect nothing more than the continu-

ance of an arrangement for the management of the settlor's affairs existing between the trustee and the settlor for a period of seven years prior to the execution of the agreement, and that that arrangement was one of principal and agent. Thus, *Pengelly's Estate* dealt with a purported trust which in reality perpetuated a previously existing principal and agent relationship. This relationship was unchanged and continued to be completely subjected to the actual directions of the settlor in its administration. As we have pointed out, in the case before us, however, Mrs. Donner exercised no actual control whatsoever. The two cases are clearly different.

—We have been furnished a certified copy of the opinion of the Supreme Court of Florida in the litigation between some of the parties to this appeal. Later, we will have occasion to refer to this opinion under the point of collateral estoppel, but in connection with the question now under discussion we regard it merely as an additional authority cited by the Lewis Group.

The Florida Supreme Court held that the law of Florida governed the question of validity of the exercise of the power of appointment, because Mrs. Donner was domiciled in Florida at the time of her death. As we have pointed out, however, the domicile of a settlor is at most a minor factor to be considered in determining the situs of an *inter vivos* trust. As we read the opinion it appears to be the theory of the Florida Court that each exercise of the power of appointment was an amendment and republication of the agreement of 1935, and since no present remainder interest was created either by the agreement, or the exercise of the power, until the death of Mrs. Donner domiciled in Florida, the validity of those remainder interests was to be tested by Florida law.

With all deference to the highest tribunal of a sister state, we disagree. Such may be the law of Florida but it is certainly not the law of Delaware. As we have pointed

out, the exercise of a power of appointment creates immediate interests which in law are as though they had been written into the original instrument. The right to revoke or change the appointment has merely the effect of making the interests thereby created subject to possible defeasance. Furthermore, we think the Florida Supreme Court, in concluding that no present interests in remainder were created by the agreement of 1935, has overlooked, presumably inadvertently, the gift in remainder to Mrs. Donner's living issue, or next of kin, in default of exercise of the power.

We are also constrained to disagree with the conclusion of the Florida Supreme Court that the agreement of 1935 created an agency relationship. The decision in this respect is based, apparently, solely upon the provisions of the agreement, itself, reserving certain powers to Mrs. Donner and requiring in some instances joint action by the trustee and the advisor. As we have pointed out, the reservation of a power to revoke or appoint the corpus of an *inter vivos* trust does not transform the relationship into one of agency. Nor is there anything in the provisions relating to the trust advisor which suggests that the advisor was subject to the dictates of Mrs. Donner. Even the facts concerning the operation of the trust, which we suspect were not before the Florida court, rebut the violent presumption necessary to be made to support the conclusion reached. The opinion of the Florida Supreme Court is not persuasive as an authority.

We think our discussion of the validity of the agreement as an *inter vivos* trust is sufficient answer to other authorities relied upon by the Lewis Group in support of its contentions under this point.

The second fundamental question is what effect, if any, does the adverse judgment entered in the Florida litigation have upon the right of the Hanson Group to litigate the question of essential validity of the trust of 1935 in Delaware.

The Florida judgment⁷ is an adjudication that by reason of the probate of Mrs. Donner's will, Florida, as the state of domiciliary administration, has substantive jurisdiction to inquire into the validity of the 1935 trust and the exercise of the powers of appointment, references to which were made in the will, and to hold them invalid under Florida law. Upon this point, the Supreme Court of Florida affirmed the trial court's ruling of invalidity. In the cross appeal, which sought a review of the trial court's holding that Florida lacked jurisdiction over the non-appearing defendants (among which were Wilmington Trust Company, Delaware Trust Company), the Florida Supreme Court reversed the trial court and held that jurisdiction over the trustee under the trust and the beneficiaries of the exercise of the power of appointment could be obtained by constructive service.

In their answer the Lewis Group pleads the Florida judgment and upon the basis of it asks for certain relief. The first prayer for relief is that Delaware Trust Company be ordered to account for the \$400,000 received by it from the trustee and be directed to transfer it to the executrix of Mrs. Donner's will. The second prayer for relief is, in the event Delaware Trust Company not be ordered to account; that a money judgment be entered against Wilmington Trust Company in the amount of \$417,000 with interest.

With respect to the second prayer for relief, it is obvious that, irrespective of the demand that Delaware Trust Company be ordered to account, the Lewis Group seeks a personal judgment against Wilmington Trust Company from the inclusion in the prayer for a judgment of \$17,000, since Delaware Trust Company has never received this sum.

7. By stipulation of the parties the record has been augmented to include the Florida judgment as finally framed by the Supreme Court of Florida, to all intents and purposes as though it had been pleaded and proven in the court below.

8. The recipients of \$3,000 of the \$17,000 appointment were not even named as parties *pro forma* in the Florida action.

The Lewis Group, therefore, seeks to use the Florida judgment as the basis for an assertion of personal liability against Wilmington Trust Company, and as a judgment *in rem* dispositive of the entire trust corpus. The full faith and credit clause of Article IV of the Federal Constitution is invoked.

The demand of full faith and credit for the Florida judgment as the prop for the assertion of personal liability against Wilmington Trust Company is defeated by the fact that Wilmington Trust Company has never been served personally with Florida process, nor has it appeared in any form in the Florida litigation. The recital of these facts is sufficient to require the denial of full faith and credit to the Florida judgment when it is sought to be made the basis for the assertion of personal liability. *Iowa-Wisconsin Bridge Co. v. Phoenix Corp.*, 2 Terry 527, 25 A. 2d 383, cert. den. 317 U. S. 671. It follows, therefore, that the prayer of the Lewis Group for a money judgment against Wilmington Trust Company was properly denied.

Next, the Lewis Group argues that the Florida judgment is entitled to full faith and credit as a judgment *in rem*. It is, of course, true that the courts of Florida may adjudicate with respect to a *res* within its boundaries and subject to its control, and full faith and credit may be successfully claimed for such a judgment in the courts of other states. *Restatement, Conflict of Laws*, § 429. But a judgment which has the force of a judgment *in rem* with respect to assets located in Florida does not acquire by reason of the full faith and credit clause any extra-territorial effect upon assets located outside of the State of Florida in the absence of seizure by the Florida courts. *Riley v. New York Trust Co.*, 315 U. S. 343, 62 S. Ct. 609. To have any extra-territorial effect such a judgment must have been rendered after the acquisition of personal jurisdiction over the party claiming the non-Florida assets. *Baker v. Baker, Eccles & Co.*, 242 U. S. 394, 37 S. Ct. 152.

The *res*, over which these parties are contending, consists entirely of corporate securities which at all times since 1935 have been located in Delaware. There has been no seizure of them by any judicial process in Florida, nor has any person or corporation holding the assets voluntarily by appearance brought them before the Florida courts.

The Supreme Court of Florida purports to find jurisdiction over this trust *res* by reason of the Florida domicile of Mrs. Donner and the probate there of her will. In an action brought to construe that will it rendered a decision "as to whether or not the instruments which created their [remainder] interests were effective to shift the trust property out of the estate of the testatrix." This was done on the theory that the last effective act of Mrs. Donner to establish remainder interests in the trust corpus, i.e., the execution of the power of appointment of 1949, was performed by her while a resident of Florida and amounted to a republication of the trust of 1935; it was held that it was as if the original instrument had been executed while she was domiciled in Florida. As we have pointed out, this result is contrary to the law of Delaware, and also the recent trend of well considered decisions in other states.

The Florida court relies upon *Henderson v. Usher*, 118 Fla. 688, 160 S. 9, but as we read that case it does not support their holding. In the *Henderson* case an action was filed for the construction of the will of a Florida decedent which purported to exercise a power of appointment over the corpus of an *inter vivos* trust created by a Florida resident in New York with a New York trustee. The donor deposited the securities comprising the trust corpus in New York, and in the instrument gave a power of appointment by will to the life beneficiary, a Florida resident. The will of the Florida donee of the power created an admittedly testamentary trust by the exercise of his power of appointment over the *inter vivos* trust corpus. Thereafter, the trustees of the testamentary trust, non-residents of Florida, instituted suit for the construction of the Florida will so

that they might be instructed as to their duties under the will and the testamentary trust.

The precise question in the *Henderson* case was the validity of constructive service upon the widow of the testator, who had remarried and was a resident of New York. Constructive service upon her was upheld upon the ground that the *res* before the court was the Florida will, and the trust established by it, and since the trustees under the will had voluntarily submitted it to the courts of Florida for adjudication, jurisdiction had thereby been conferred over the testamentary trust. Furthermore, there was no question but that the Florida will had by the exercise of the power created a Florida testamentary trust. In issue was the right of the widow to receive income from the testamentary trust. There was no issue concerning the rights of anyone arising out of the New York *inter vivos* trust.

The *Henderson* case, therefore, is not authority for the assertion of jurisdiction by Florida over an *inter vivos* trust created and administered in Delaware. The will of Mrs. Donner, contrary to the apparent view of the Florida Supreme Court, did not exercise the reserved power of appointment. That power was exercised in 1949 and a part of the Delaware trust corpus was appointed to her Florida executrix and disposed of by the residuary clause of her will. With respect to this portion of the *inter vivos* trust corpus, it is clear that Florida has jurisdiction since it passes as part of Mrs. Donner's estate; but with respect to the \$417,000 appointed to non-Floridians it is equally clear, not only that Mrs. Donner did not intend it to pass as part of her estate, but that Florida has never had the remotest connection with or power over it.

The Florida Supreme Court cites as further authority for its assumption of jurisdiction over the 1935 trust the case of *Swetland v. Swetland*, 105 N. J. Eq. 608; 149 A. 50; aff. 107 N. J. Eq. 504, 153 A. 907. This case, however, is not authority for the assumption of jurisdiction under these circumstances. The *Swetland* case was a bill for accounting

against a non-resident trustee based on the dissipation and misappropriation of the corpus of an *inter vivos* trust created and administered in New York. The complainants sought an injunction against the New Jersey executors of the creator's New Jersey will, which added a large amount to the original *inter vivos* trust corpus, from paying it over to the trustee, and sequestered the non-resident trustee's interest in the creator's New Jersey estate. Since the assets themselves were in the hands of New Jersey executors and had by sequestration been subjected to the power of the court, it was held that irrespective of the situs of the trust the court could enforce its decree to the extent of the property sequestered. It is plain that the *Swetland* case is distinguishable.

It follows, therefore, that the Florida judgment is not entitled to full faith and credit as a judgment *in rem* as to the \$417,000 which has never been subjected to the control of the Florida court and, as such, a bar to the action before us.

The Lewis Group next argues that irrespective of full faith and credit, the Florida judgment precludes the litigation of the question of essential validity of the 1935 trust as a matter of *res adjudicata* or, in the alternative, as a matter of collateral estoppel.

The doctrine of *res adjudicata* has no application in the pending action because the essence of the doctrine is that the prior judgment raised as a bar must have been rendered in a prior action between the same parties involving the same cause of action asserted in the second action. *Restatement, Judgments*, § 48; *Collateral Estoppel by Judgment*, 56 Harv. L. R. 1. It is obvious that we are dealing here with an entirely different cause of action from that tried in Florida. In Florida the issue was, what assets passed under the will of Mrs. Donner? The Florida ruling, that the exercise of the power of appointment was

testamentary, was an implicit ruling of invalidity of the 1935 agreement as an *inter vivos* trust, but it was only incidental to the main issue raised in the Florida proceeding.

This fact is sufficient answer to the assertion of the defense of *res adjudicata*, but it would seem to be clear that it could not be availed of in any event because of the inherent lack of jurisdiction of the Florida courts over some of the parties to this cause and over the subject matter of this suit.

The Lewis Group argues, in the alternative, that the Hanson Group, however, are collaterally estopped by the Florida judgment from relitigating the question of essential validity of the 1935 agreement as an *inter vivos* trust. The doctrine of collateral estoppel is recognized and applied in proper cases by Delaware courts. *Petrucchi v. Landon*, 9 Terry 491, 107 A. 2d 236; *Niles v. Niles* (Del. Ch.), 111 A. 2d 697.

Florida in a direct proceeding would have had no jurisdiction to determine the validity of an *inter vivos* trust whose situs was in Delaware and whose trustee was not subject to Florida process. 54 *Am. Jur., Trusts*, § 564, § 584; *Lines v. Lines*, 142 Pa. 149, 21 A. 809. It may, however, occur that in an action in Florida over which Florida admittedly has jurisdiction it might become necessary for the Florida court to decide a question which it would have had no jurisdiction over in a direct proceeding brought for that purpose. In such event, when such question has actually been litigated and fought out by the same parties in the prior action, a collateral estoppel may sometimes be raised against such parties in a second action in which the same issue is raised. We are of the opinion, however, that no collateral estoppel arises in the pending case.

In the first place, a recognized exception to the doctrine exists when the second action is brought in a court having jurisdiction of the subject matter and parties to determine directly the issue decided only incidentally in the first

action. *Restatement, Judgments*, § 71; *Collateral Estoppel by Judgment*, 56 Harv. L. R. 1, 22; *Annotation*, 147 A. L. R. 225. The action before us was brought in the Court of Chancery to determine directly the validity of the 1935 agreement as an *inter vivos* trust and that court has jurisdiction of the subject matter and the necessary parties. Since the holding of invalidity by the Florida courts was only incidental to the main issue presented to it, the case falls directly within the exception to the doctrine.

In the second place, the doctrine of collateral estoppel is applied only when the same parties in the second action have had their day in court in the first action on the issue in question. This rule is based on the consideration that the proper administration of justice will be served best by limiting parties to one trial of one issue. See *Niles v. Niles*, *supra*.

The Florida judgment does not meet this condition, for the Delaware trustee and the beneficiaries of the exercise of the power have never had their day in court on this issue.

It does not answer this objection to argue, as the Lewis Group does, that these parties received notice of the pendency of the Florida action and could have appeared in that forum and defended the action. To be sure, they could have done so, but they elected not to, for there was no *res* before the Florida court the seizure of which would have furnished a compulsive force for their appearance. To hold that in the absence of jurisdiction over the *res* in controversy Florida can compel appearance through substituted service would be a violation of the due process clause of the 14th Amendment. *Pennoyer v. Neff*, 95 U. S. 714, 24 S. Ct. 565.

The Lewis Group argues, however, that Wilmington Trust Company and Delaware Trust Company are bound by the Florida judgment to all intents and purposes as though they had appeared in the cause because the various beneficiaries of the trusts were subject to the jurisdiction of the

Florida court.⁹ The argument is that when a *cestui que trust* is bound by the judgment of a court, the trustee is likewise bound because he is in privity with the *cestui*. It is argued that these particular trustees were mere stakeholders and, as such, were unnecessary parties to the Florida action. *Thompson v. Hammond*, (N. Y.) 1 Edw. Ch. 497, and *First National Bank v. Ickes*, 60 F. Supp. 366, are cited in support of the argument. We have read these cases and are of the opinion that they do not remotely support the contention.

Furthermore, we think it the law that while a *cestui que trust* is bound in most circumstances by an adjudication against his trustee, *Iowa-Wisconsin Bridge v. Phoenix Corp.*, supra, the converse of that proposition is not the law, particularly when the adjudication affects the existence of the trust itself. It is the duty of a trustee to defend the existence of his trust, 2 *Scott on Trusts*, § 178, even against an attempt by the settlor and sole beneficiary to overthrow it. Cf. *Weymouth v. Delaware Trust Co.*, 29 Del. Ch. 1, 45 A. 2d 427. A trustee is also an indispensable party to a suit involving the trust property, and in defense of title to the trust property. 54 *Am. Jur., Trusts*, § 584.

In view of this, it is impossible to accept on principle the argument that a judgment against a *cestui que trust* binds the non-appearing trustee. At the argument, counsel for both groups stated that they had found no authority so holding, nor have our own researches disclosed any. Upon reflection, we are not surprised that there is none, for any such rule might permit a beneficiary by shopping around among jurisdictions to defeat the trust against the manifest intent of the trustor. We, therefore, are of the opinion that the non-appearing defendants in Florida are not estopped by the judgment on the ground of privity with appearing defendants.

9. No similar argument is made with respect to the recipients of the \$17,000 appointment.

Finally, we think the public policy of Delaware precludes its courts from giving any effect at all to the Florida judgment of invalidity of the 1935 trust. We are dealing with a Delaware trust. The trust *res* and trustee are located in Delaware. The entire administration of the trust has been in Delaware. The attack on the validity of this trust raises a question of first impression in Delaware and one of great importance in our law of trusts. To give effect to the Florida judgment would be to permit a sister state to subject a Delaware trust and a Delaware trustee to a rule of law diametrically opposed to the Delaware law. It is our duty to apply Delaware law to controversies involving property located in Delaware, and not to relinquish that duty to the courts of a state having at best only a shadowy pretense of jurisdiction. Cf. *Taylor v. Crosson*, 11 Del. Ch. 145, 98 A. 375.

We conclude, therefore, that the agreement of 1935 between Mrs. Donner and Wilmington Trust Company created a valid *inter vivos* trust, that the exercise by Mrs. Donner of the power of appointment reserved in that agreement was effective to dispose of the trust corpus, and that the parties to this cause are not estopped by the Florida judgment from having those questions adjudicated by the Delaware Court of Chancery.

The judgment of the Court of Chancery will be affirmed.

IN THE
SUPREME COURT OF THE STATE OF DELAWARE.

DORA STEWART LEWIS, MARY WASHINGTON STEWART BORIE and PAULA BROWNING DENCKLA,

Defendants Below, Appellants,

v.

ELIZABETH DONNER HANSON, as Executrix and Trustee under the Last Will of Dora Browning Donner, deceased,

Plaintiff Below, Appellee,

WILMINGTON TRUST COMPANY, a Delaware corporation, as Trustee under three separate Agreements, (1) and (2) with William H. Donner dated March 18, 1932 and March 19, 1932, and (3) with Dora Browning Donner, dated March 25, 1935, et al.,

Defendants Below, Appellees.

No. 8, 1956.

Appeal from the Court of Chancery of the State of Delaware in and for New Castle County, Civil Action No. 531. ●

ORDER.

AND NOW, To WIT: this 7th day of February, A. D. 1957, the petition of Dora Stewart Lewis, Mary Washington Stewart Borie and Paula Browning Denckla for re-argument having come on to be heard, and the same having been duly considered, it is

ORDERED, ADJUDGED and DECREED:

That the same be and hereby is denied, and it is

FURTHER ORDERED, ADJUDGED and DECREED:

That the mandate of this Court shall be stayed for a period of ninety (90) days from the date hereof to permit the said Dora Stewart Lewis, Mary Washington Stewart Borie and Paula Browning Denckla to apply to the Supreme

Court of the United States for a writ of certiorari, and, if such application be made within said period, the mandate of this Court shall be stayed until the final order of the Supreme Court of the United States.

DANIEL F. WOLCOTT,
Justice.

HOWARD M. BRAMHALL,
Justice.

JAMES B. CAREY,
Judge.

APPROVED AS TO FORM:

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IN THE

Supreme Court of the United States

October Term, 1956.

No. ~~913~~ 107

ELIZABETH DONNER HANSON, Individually, as Executrix of the Will of Dora Browning Donner, Deceased, and as Guardian ad Litem for JOSEPH DONNER WINSOR and DONNER HANSON, and WILLIAM DONNER ROOSEVELT, Individually, *Appellants,*

KATHERINE N. R. DENCKLA, Individually, and ELWYN L. MIDDLETON, as Guardian of the property of DOROTHY BROWNING STEWART, Also Known as DOROTHY B. STEWART and DOROTHY B. RODGERS STEWART, an Incompetent Person, *Appellees.*

APPELLANTS' BRIEF OPPOSING APPELLEES'
MOTION TO DISMISS APPEAL.

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IN THE
Supreme Court of the United States.

OCTOBER TERM, 1956.

No. 918.

ELIZABETH DONNER HANSON, Individually, as Executrix of the will of Dora Browning Donner, Deceased, and as Guardian ad Litem for JOSEPH DONNER WINSOR and DONNER HANSON, and WILLIAM DONNER ROOSEVELT, Individually,

Appellants,

v.

KATHERINE N. R. DENCKLA, Individually, and ELWYN L. MIDDLETON, as Guardian of the property of DOROTHY BROWNING STEWART, also known as DOROTHY B. STEWART and DOROTHY B. RODGERS STEWART, an incompetent person,

Appellees.

**APPELLANTS' BRIEF OPPOSING APPELLEES'
MOTION TO DISMISS APPEAL.**

While appellants believe that all of the points attempted to be made in Appellees' Motion to Dismiss are fully and adequately met in Appellants' Jurisdictional Statement, Appellants believe that by filing a reply they may be helpful to the Court in correcting the erroneous statements contained in the motion.

Appellees' motion admits and emphasizes the fact that if they are to prevail, it must be on the basis that "the

action filed by appellees in the trial court had as its sole purpose the determination of what property passed under the will of Mrs. Donner * * *." In the short space of five printed pages, they use the phrase "what passed under the Will" (with slight variation in some of the wording) a total of eight times. They insist that this theory of the case is supported, or at least recognized, not only by the trial and appellate courts of Florida, but also by the Supreme Court of the State of Delaware. The record does not support them.

(a) The Florida trial court in its order of April 9, 1954 (T. 51) found that the suit was "primarily concerned with the validity and effect of certain powers of appointment rather than the Will" and in its order of January 14, 1955 (23a) it made a direct ruling "that the power of appointment was testamentary in character and did not constitute a valid inter vivos trust appointment".

(b) The Florida appellate court had the temerity to admit the validity of the trust, saying: "We do not question the validity of the beneficial life estate reserved by the settlor" (9a). It then held that this valid trust was re-published by Mrs. Donner after she had moved her residence from Pennsylvania to Florida by the exercise of the power of appointment dated December 3, 1949, and concluded that it "must consider the validity of the trust and the remainder interests it sought to create * * *" (10a). Having thus assumed jurisdiction, it proceeded to declare the trust invalid.

Appellants submit that the weakness of the early statement in the opinion of the Florida appellate court that "Jurisdiction existed by virtue of the Will * * *" (7a), is obvious in view of its later findings on the question of the validity of the trust. But the undeniable answer to appellees' position is that no action was needed to determine "what passed under the Will". Everything passed under its clear and unambiguous terms except property which had

been validly and legally disposed of in Mrs. Donner's lifetime.¹

(c) It is true that the Supreme Court of the State of Delaware said:

"In Florida the issue was, what assets passed under the Will of Mrs. Donner? The Florida ruling that the exercise of the power of appointment was testamentary was an implicit ruling of the invalidity of the 1935 agreement as an *inter vivos* trust, but it was only incidental to the main issue raised in the Florida proceeding." (39a)

That Court went on to say, however:—

"This fact is sufficient answer to this assertion of the defense of *res adjudicata*, but it would seem clear that it could not be availed of in any event because of the inherent lack of jurisdiction of the Florida courts over some of the parties to this cause and over the subject matter of this suit." (40a)

We submit that the grounds for appellees' motion to dismiss must fall once its "keystone", namely, "what passes under the Will" is removed.

1. The Appeal Does Present Substantial Federal Questions.

The Florida Courts, in their efforts to grasp jurisdiction under the provisions of Florida Statutes (1953) 48.01 and 48.02 whether by claiming power over absent indispensable parties through constructive service or by treating an unambiguous will or a foreign *inter vivos* trust as a res,

1. The error referred to in appellees' insidious footnote 2 on page 5 of their motion is completely explained and negated in the record. The Trial Court summarily disposed of appellees' argument on this point (1a) and the Appellate Court ignored it.

attempt to take appellants' property² without extending to them the due process guaranteed to them by the Fourteenth Amendment. Appellees have continually throughout these proceedings and in their present motion threatened to surcharge the executrix, since she cannot recover the trust assets in the face of the judgment of the Delaware Courts.³ The *Liberty Warehouse* and *Smith* decisions of this Court were not concerned with the absence of indispensable parties and are not applicable to this proceeding. See *McArthur v. Scott*, (1885) 113 U. S. 340, 396. We submit that the Supreme Court of Florida must have recognized that in the absence of Wilmington Trust Company and the non-resident beneficiaries, its ruling would be futile, and for that reason it necessarily had to reverse the trial judge on the question of jurisdiction in order to reach its end result.

2. The Federal Questions Were Timely and Properly Raised and Expressly Passed Upon.

We again point out that the jurisdiction of the Florida Courts was raised in appellants' first pleading and throughout the proceeding. When ruling on their motion to dismiss was deferred on April 9, 1954, they petitioned the Supreme Court of Florida for certiorari, without success. The Court's jurisdiction was again questioned as a separate defense in their answer and in their motion to stay the action during the pendency of the Delaware proceeding. When this motion was denied on August 25, 1954, they again petitioned the Supreme Court for certiorari, again without

2. Appellees' motion (p. 3) erroneously charges that "Hanson * * * is the sole appellant." William Donner Roosevelt is also an appellant, and if either of his brothers died without issue, he might share in property in this trust. Why else would appellees join him as a defendant?

3. Appellees charge Mrs. Hanson with using her children to further the Delaware proceedings. The children were represented by Edwin D. Steel, Jr., Esq., a member of the firm of Morris, Steel, Nichols & Arshlt, of Wilmington, Delaware, who was appointed guardian ad litem by the Delaware Chancellor (19a).

success. The question was argued before and decided by the Trial Court which held that it had no jurisdiction over the Trustee, the trust res, or the non-resident beneficiaries in its order of January 14, 1955. It was re-argued before the Trial Court in an effort to convince that court that it could not render a final enforceable decree in the absence of indispensable parties and the trust res. It, and the further questions of the Constitutional right to full faith and credit of the judgment of the Delaware Courts, were argued before the Supreme Court on March 27, 1956, and ruled upon by that court in its opinion of September 19, 1956. Finally, the Federal questions raised in this appeal were again presented to the Supreme Court in appellants' petition for rehearing which was denied by order of that Court dated November 28, 1956, which by its terms recites that the petition "has been considered".

3. The Judgment Appealed From Does Not, as Claimed by Appellees, Rest on an Adequate Non-Federal Basis.

Appellants have bottomed this appeal on three individually adequate Federal questions.

(a) Lack of due process under the Fourteenth Amendment.

(b) Failure of the Florida Courts to give full faith and credit to the judgment of the Delaware Courts in violation of Article Fourth of the Constitution.

(c) Failure to apply the proper state law in violation of the Fourteenth Amendment.

We submit that if this Court should consider that appellants could not independently raise the question of the Florida court's jurisdiction over absent indispensable parties, then this Court should grant certiorari under the provisions of 28 U. S. C., Sec. 2103.⁴

4. Appellants are advised that a Petition for Certiorari to the Delaware Supreme Court is about to be filed in this Court by the Denckla-Stewart interests.

6. *Appellants' Brief Opposing Appellees' Motion*

WHEREFORE, appellants respectfully move that appellees Motion to Dismiss be denied and appellants appeal be granted.

Respectfully submitted,

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SUPREME COURT, U.S.
NOV 20 1957
JOHN T. PEY, CLERK
IN THE

Supreme Court of the United States

October Term, 1957.

No. 107.

ELIZABETH DONNER HANSON, Individually, as Executrix
of the Will of Dora Browning Donner, Deceased, et al.,
Appellants.

v.

KATHERINE N. R. DENCKLA, Individually, and ELWYN
L. MIDDLETON, as Guardian of the property of DORO-
THY BROWNING STEWART, Also Known as DORO-
THY B. STEWART, etc.,
Appellees.

BRIEF OF APPELLANTS.

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	Page
OPINIONS BELOW	1
JURISDICTION	2
STATUTE INVOLVED	4
QUESTIONS PRESENTED FOR REVIEW	6
STATEMENT OF THE CASE	7
SUMMARY OF ARGUMENT	14
ARGUMENT	15
I. The Application by the Florida Courts of the Provisions of Chapter 48, Florida Statutes, Section 48.01 and 48.02, as a Basis for Jurisdiction to Decree the Devolution of Property Outside Its Jurisdiction and in the Hands of a Trustee Who Was Not Personally Served With Process, Who Has Not Appeared in the Proceedings, and Who Has No Place of Business, Has Never Conducted Business and Who Has No Officers, Agents or Representatives in the State of Florida, Violates the Fourteenth Amendment of the Constitution of the United States	15
(a) The Wilmington Trust Company, the trustee, is an indispensable party	18
(b) The parties appointed as beneficiaries of the trust are indispensable parties	21
(c) There was no res in Florida, which could be used as the basis for constructive service	22
II. The Florida Courts Must Give Full Faith and Credit to the Judgments of the Delaware Chancery and Supreme Courts	23
III. The Florida Courts in Failing to Apply Delaware Law in the Determination of the Validity of a Delaware Trust Denied Due Process	26
IV. The Florida Supreme Court Erred in Reaching a Conclusion Which Is Totally Lacking in Comity and Is Unenforceable	30
CONCLUSION	32

TABLE OF CASES CITED.

	Page
Armstrong v. Armstrong, (1956) 350 U. S. 568	15, 25
Baker v. Baker, Eccles & Co., (1916) 242 U. S. 394	25
Cutts v. Najdowski, (N. J. Eq. 1938) 198 Atl. 885 (R. 198) ...	19, 28
Dahnke-Walker Milling Company v. Bondurant, (1921) 257	
U. S. 282	3
Findlay v. F. E. C. Railway Company, (D. C. Fla. 1933) 3 F.	
Supp. 393 <i>aff'd</i> : (C. A. 5) 68 Fed. 2d 540	22
Gulda v. Second National Bank, (1948) 80 N. E. 2d 12, 25	
A. L. R. 2d 605	22
Henderson v. Usher, (1935) 118 Fla. 688, 160 So. 9	18
Home Insurance Co. v. Dick, (1930) 281 U. S. 397	29, 30
International Shoe Co. v. Washington, (1945) 326 U. S. 310 ..	25
Lines v. Lines, (Pa. 1891) 21 Atl. 809	18
Martin v. Martin, (Pa. 1906) 63 Atl. 1026	19
May v. Anderson, (1953) 345 U. S. 528	25
McArthur v. Scott, (1885) 113 U. S. 340	20
McHardy v. McHardy, (1857) 7 Fla. 301	27
National Shawmut Bank of Boston v. Cumming, (1950) 91	
N. E. 2d 337	28
Pennoyer v. Neff, (1878) 95 U. S. 714	19
Riley v. New York Trust Co., (1942) 315 U. S. 343	25
Rochie v. McDonald, (1928) 275 U. S. 449	24
Sadler v. Industrial Trust Company, (1951) 97 N. E. 2d 169 ..	20
Swetland v. Swetland, (N. J. Eq. 1930) 149 Atl. 50, 153 Atl.	
907	19, 28
Warner v. Florida Bank and Trust Co., (1947) 160 F. 2d 766 ..	29
Wilmington Trust Co. v. Wilmington Trust Co., (Del. Supreme	
✓ Ct. 1942) 24 A. 2d 309, 139 A. L. R. 1117	27
Wilson v. Russ, (1880) 17 Fla. 691	20
Winn v. Strickland, (Fla. 1894) 16 So. 606	20

TABLE OF STATUTES AND AUTHORITIES CITED.

	Page
30 C. J. S. 437	19
Statute of the State of Florida, Chap. 48, Fla. St. (1953) 48.01 and 48.02, Vol. 1, p. 233	4, 5, 6, 9, 15
62 Stat. 929, 28 U. S. C. Sec. 1257 (2)	3
62 Stat. 962, 28 U. S. C. Sec. 2103	3
United States Constitution:	
Article IV, Section 1	6
Fourteenth Amendment	29
Fourteenth Amendment, Section 1	6, 9

IN THE
Supreme Court of the United States.

October Term, 1957.

No. 107.

ELIZABETH DONNER HANSON, INDIVIDUALLY, AS
EXECUTRIX OF THE WILL OF DORA BROWNING DONNER,
DECEASED, ET AL.,

Appellants,

v.

KATHERINE N. R. DENCKLA, INDIVIDUALLY, AND
ELWYN L. MIDDLETON, AS GUARDIAN OF THE PROP-
ERTY OF DOROTHY BROWNING STEWART, ETC.,

Appellees.

APPEAL FROM THE SUPREME COURT OF THE STATE OF FLORIDA.

BRIEF OF APPELLANTS.

OPINIONS BELOW.

The opinion of the Supreme Court of Florida has not been reported either officially or unofficially. It is printed in the Record (R. 181-192). The opinion of the Circuit Court of Palm Beach County, which is affirmed in part and reversed in part by the Supreme Court is not reported. It is printed in the Record (R. 110).

JURISDICTION.

The primary ground for this appeal is lack of jurisdiction of the Florida Court.

Appellants raised this question (a) by their first motion filed in this action in the Circuit Court of Palm Beach County, (b) in their certiorari to the Supreme Court of Florida from the order of said Court postponing determination of the question, (c) in their motion to stay the action in the Circuit Court pending determination of the same questions in an action in the Court of Chancery of the State of Delaware, (d) in their certiorari to the Florida Supreme Court from the order denying the stay, (e) in their answer to the complaint in the Circuit Court, (f) in their briefs and arguments to the Florida Supreme Court, and (g) in their petition and extraordinary petition for rehearing in the Florida Supreme Court as more particularly set forth in their Statement of the Case (p. 7). Appellants' further grounds for review are the failure of the Florida Courts (1) to apply Delaware law in passing upon the validity of a Delaware trust, (2) to give full faith and credit to the judgments of the Delaware Courts determining the validity of the trust, and (3) to grant comity to the enforceable judgments of the Delaware Courts which by their terms prevent enforcement of their (the Florida Courts') judgments.

The judgment of the Supreme Court of Florida was entered on September 19, 1956 (R. 182). Its order denying Appellants' petition for rehearing was entered on November 28, 1956 (R. 204). Appellants' notice of appeal to this Court was filed in the Supreme Court of Florida on February 21, 1957 (R. 234). This Court, by order dated June 17, 1957, postponed further consideration of the question of jurisdiction to the hearing of the case on the merits and consolidated this case with the case of *Lewis, et al. v. Hanson*, No. 977 October Term, 1956 (R. 238) in which this Court granted certiorari to a judgment of the Supreme Court of the State of Delaware determining that the trust involved in this case is valid and enforceable.

The judgment of the Supreme Court of Florida dated September 19, 1956, as finalized by its denial of Appellants' petition for rehearing on November 28, 1956, was a final judgment by the highest court of that State. Jurisdiction of this Court to review the judgment on appeal is conferred by 62 Stat. 929, 28 U. S. C. Sec. 1257 (2). *Dahnke-Walker Milling Company v. Bondurant*, (1921) 257 U. S. 282. This Court may also review the judgment by granting certiorari under 62 Stat. 962, 28 U. S. C. Sec. 2103.

STATUTE INVOLVED.

The full text of the Statute of the State of Florida (Chap. 48, Fla. St. (1953) 48.01 and 48.02, Vol. 1, p. 233), the validity of which is involved in this appeal, is:

48.01. *Service of process by publication, in what cases.*

Service of process by publication may be had, in any of the several courts of this state, and upon any of the parties mentioned in 48.02 in any suit or proceeding:

(1) To enforce any legal or equitable lien upon or claim to any title or interest in real or personal property within the jurisdiction of the court or any fund held or debt owing by any party upon whom process can be served within this state.

(2) To quiet title or remove any encumbrance, lien or cloud upon the title to any real or personal property within the jurisdiction of the court or any fund held or debt owing by any party upon whom process can be served within this state.

(3) For the partition of real or personal property within the jurisdiction of the court;

(4) For divorce or annulment of marriage;

(5) For the construction of any will, deed, contract or other written instrument and for a judicial declaration or enforcement of any legal or equitable right, title, claim, lien or interest thereunder.

(6) For the reestablishment of lost instruments or records which have or should have their situs within the jurisdiction of the court;

(7) In which there shall have been issued and executed any writ of replevin, garnishment or attachment;

(8) In which any other writ or process shall have been issued and executed so as to place any property, fund or indebtedness in custodia legis;

(9) In scire facias to revive a judgment;

(10) In any other suit or proceeding, not hereinabove expressly mentioned, wherein personal service of process or notice is not required by the statutes or constitution of this state or by the Constitution of the United States.

48.02. Service of process by publication, upon whom.

Where personal service of process cannot be had, service of process by publication may be had upon any party, natural or corporate, known or unknown, including:

(1) Any known or unknown natural person, and, when described as such, the unknown spouse, heirs, devisees, grantees, creditors or other parties claiming by, through, under or against any known or unknown person who is known to be dead or is not known to be either dead or alive;

(2) Any corporation or other legal entity, whether its domicile be foreign, domestic or unknown, and whether dissolved or existing, including corporations or other legal entities not known to be dissolved or existing, and, when described as such, the unknown assigns, successors in interest, trustees, or any other party claiming by, through, under or against any named corporation or legal entity;

(3) Any group, firm, entity or persons who operate or do business, or have operated or done business, in this state, under a name or title which includes the word "corporation," "company," "incorporated," "inc." or any combination thereof; or under a name or title which indicates, tends to indicate or leads one to think that the same may be a corporation or other legal entity; and

(4) All claimants under any of such parties. Unknown parties may be proceeded against exclusively or together with other parties.

QUESTIONS PRESENTED FOR REVIEW.

The questions presented for review are:

(i) Do the provisions of Chapter 48, Florida Statutes, Sections 48.01 and 48.02, violate the Constitution of the United States (in particular, Section 1 of the Fourteenth Amendment thereto) where said Statute is used by the Supreme Court of Florida as a basis for jurisdiction to decree the devolution of property outside its jurisdiction and in the hands of a trustee who was not personally served with process, who has not appeared in the proceedings and who has no place of business, has never conducted business and has no officers, agents or representatives in the State of Florida?

(ii) Do the provisions of Chapter 48, Florida Statutes, Sections 48.01 and 48.02, violate the Constitution of the United States (in particular, Section 1 of the Fourteenth Amendment thereto) where said Statute (in particular, 48.01 (5)) was used by the Supreme Court of Florida, under the guise of construing a *clear and unambiguous* will, for the sole purpose of declaring invalid an *inter vivos* trust whose situs, property and trustee were all outside the jurisdiction of the Court and whose trustee was not personally served with process and did not appear in the proceedings?

(iii) Does the refusal of the Supreme Court of Florida to give full faith and credit to the judgment of the Court of Chancery of the State of Delaware and the Supreme Court of the State of Delaware, both courts of competent jurisdiction, having control over the trust res, the trustees and all of the beneficiaries of the trust contravene the Constitution of the United States (in particular, Section 1 of Article IV thereof)?

(iv) Did the Supreme Court of Florida err in refusing to apply the law of Delaware in determining the validity of a trust having its situs in Delaware?

(v) Did the Supreme Court of Florida err in holding that the *inter vivos* trust agreement was valid insofar as it created a beneficial life estate in the settlor and that it was republished in Florida so as to become subject to jurisdiction of the Florida Courts for the sole purpose of decreeing its invalidity?

(vi) Did the Supreme Court of Florida err in reaching a conclusion which is totally lacking in comity and is unenforceable in the face of the mandates of the Court of Chancery of the State of Delaware and the Supreme Court of the State of Delaware?

STATEMENT OF THE CASE.

This action was brought for the purpose of determining the validity of the exercise of a power of appointment reserved in an *inter vivos* trust created in Delaware by agreement dated March 25, 1935, between Dora Browning Donner, then a resident of the State of Pennsylvania, and Wilmington Trust Company, a banking corporation of the State of Delaware, having its principal place of business in Wilmington, Delaware, as Trustee (R. 17). On December 3, 1949, after Mrs. Donner had moved to and become a resident of the State of Florida, she executed (and later amended under date of July 5, 1950) her reserved power of appointment (R. 31), appointing the trust funds as follows: \$200,000 to each of two trusts for the benefit of Joseph Donner Winsor and Donner Hanson, two of the Appellants herein, of which Delaware Trust Company, a banking corporation of the State of Delaware, having its principal place of business in Wilmington Delaware, is Trustee; \$10,000 to the Bryn Mawr (Pennsylvania) Hospital; an aggregate of \$7,000 to six employees (all non-residents of the State of Florida); and the residue to Elizabeth Donner Hanson, one of the Appellants herein, "as the Executrix of [her] Last Will and Testament to be dealt with by her in accordance with the terms and conditions of said Last Will and Testament"

In her Will, executed on the same day as this power, after disposing of her tangible personal property and directing her Executrix to pay out of her estate "all estate, inheritance, transfer or other succession or death duties, State and Federal, which by reason of [her] death shall become payable upon or with respect to the property appointed by [her] by the exercise of the power of appointment provided in [her] favor in paragraph 1 of a certain trust agreement entered into between [her] and Wilmington Trust Company, a Delaware corporation, as Trustee on the 25th day of March, 1935", she bequeathed one-half of the remainder to Delaware Trust Company as Trustee under a third trust for the benefit of Katherine N. R. Denckla, one of the original Plaintiffs and an Appellee in this action, and the remaining one-half to Elizabeth Donner Hanson, as Trustee of a trust created by said Will for the benefit of Dorothy B. Rodgers Stewart, who through her guardian, Elwyn L. Middleton, is the remaining original Plaintiff and Appellee in this action (R. 12).

Mrs. Donner died on November 20, 1952, and her Will was probated in Palm Beach County, Florida (R. 5).

Wilmington Trust Company, in obedience to the direction of the power of appointment dated December 3, 1949 to pay over the trust fund "as soon as conveniently may be", between January 7, 1953 and February 11, 1953, paid Bryn Mawr Hospital the \$10,000 appointed to it and the six employees the \$7,000 appointed to them. On March 30, 1953, it delivered to Delaware Trust Company, Trustee of the two trusts for Joseph Donner Winsor and Donner Hanson, securities and cash in the amount of \$200,000 for each trust. (R. 105). Wilmington Trust Company continues to hold the residue of the trust estate for the account of the Executrix (R. 106). None of the trust assets have ever been in the State of Florida and neither of the Trust Companies has any office, officers, agents or representatives, or does any business, in that State (R. 102, 104, 106).

After this distribution and after the expiration of the time period within which the Trustee was ordered to make distribution, namely, "not later than twelve months after * * * [Mrs. Donner's] death" (November 20, 1953), Appellees on January 22, 1954 filed this action in the Circuit Court of Palm Beach County, for a determination and declaration "of what portion of the trust property * * * passes under the residuary clause of the will of the decedent". (R. 12). Appellants, all being residents of the State of Florida, were personally served with process and appeared herein through their attorneys (R. 37). Three of the servants who were appointed to and paid a portion of the trust fund were not named as defendants. The Trust Companies, the Bryn Mawr Hospital and the remaining three servants, all being non-residents, could not be personally served and did not appear. Jurisdiction over them was attempted by constructive service under the provisions of Chapter 48, Florida Statutes, Sections 48.01 and 48.02 (R. 39, 41).

Appellants filed a motion to dismiss the action on the grounds that the Circuit Court lacked jurisdiction over the subject matter of the action for the reasons, inter alia, (1) that none of the corporate defendants or trustees had offices, officers, agents or representatives, or did business, in the State of Florida and there was no res in the State of Florida which would constitute a legal basis for constructive service; (2) that the exercise of jurisdiction under the circumstances would contravene the Constitution and Laws of the State of Florida and the Constitution of the United States, and, in particular, Section 1 of the Fourteenth Amendment to the United States Constitution; and (3) that the plaintiffs had failed to join and therefore the Court lacked jurisdiction over indispensable parties to the disposition of the suit (R. 40). After hearing, the Circuit Court on April 9, 1954, determined that:

"Though this suit is primarily concerned with the validity and effect of certain powers of appointment

rather than the will, I am inclined to think that the matter sought to be presented by the motion filed February 18, 1954, can best be determined at final hearing." (R. 43)

Ruling was therefore postponed "*until trial and final hearing*".

Appellants petitioned the Supreme Court of Florida for certiorari (R. 125), which was denied by order dated July 1, 1954 (R. 47).

Appellant, Elizabeth Donner Hanson, as Executrix and Trustee under Mrs. Donner's will, then filed an action in the Court of Chancery of the State of Delaware, impleading all interested parties and after reporting to that Court that the complaint in this action charged her with having "failed to take any steps" to "capture" the trust assets, prayed that the Court "determine by declaratory judgment the persons entitled to participate in the assets held in trust by the Wilmington Trust Company * * *" and "enter decrees awarding said funds to the persons entitled thereto" (R. 55).

Appellants then filed their answer in this action (R. 48) appending a copy of the Delaware complaint and reporting to the Circuit Court of Palm Beach County that "intending to meet Plaintiffs' charge that [the Executrix] has failed to take steps to 'capture' assets belonging to said Estate and in order to expedite the final determination of the controversy raised by plaintiffs [she had] on the 28th day of July, 1954, filed in the Court of Chancery of the State of Delaware, * * * a complaint for declaratory judgment against Wilmington Trust Company as Trustee, the Plaintiffs in this suit and others, asking the Court to determine the parties entitled to participate in the assets held in trust by Wilmington Trust Company * * *." Appellants' answer avers that the Delaware Court "is the only Court (1) having jurisdiction of the aforesaid trust, the Trustee and the trust assets; (2) which can appropriately and finally

determine the validity of said exercise of powers of appointment and (3) whose decree would be entitled to full faith and credit under the Constitution of the United States" (R. 54). The answer renewed Appellants' charge that the Circuit Court of Palm Beach County lacked jurisdiction to finally determine the questions raised by the complaint and prayed that the proceedings be stayed pending the determination of the Delaware Court (R. 52, 53, 54).

On August 25, 1954, the Circuit Court of Palm Beach County denied Appellants' motion for a stay (R. 94) and Appellants again petitioned the Supreme Court of Florida for a writ of certiorari to review said action (R. 131). This was denied by order of that Court dated November 26, 1954 (R. 96).

Appellees and Appellants both filed motions for a Summary Final Decree on the record (R. 95, 97). Argument was heard by the Circuit Court of Palm Beach County on January 5, 1955, and on January 14, 1955, the Court filed its "Summary Final Decree" holding:

"As to jurisdiction, the trust assets and the trustee are in Delaware. No personal service has been had upon the defendants who failed to answer * * *. Hence this Court considers that it has no jurisdiction over the non-answering defendants" (R. 110).

The Court thereupon dismissed the action as to the non-answering defendants, but proceeded to hold that "as to the parties now before the Court, the assets held under the provisions of the trust agreement dated March 25, 1935, between the decedent, Dora Browning Donner, and the Wilmington Trust Company, as Trustee, and additions thereto passed under the Will of Dora Browning Donner, dated December 3, 1949, and disposition thereof is determined by the residuary clause of said will * * *" (R. 111).

Appellants petitioned for rehearing primarily on the ground that the Court having found that it lacked jurisdiction over the trustees and over the trust res was neces-

sarily prevented from finally and effectively determining the litigation (R. 112). This petition was denied by order of the Court dated March 3, 1955, after which both Appellants and Appellees appealed to the Supreme Court of Florida (R. 120).

On December 28, 1955, the Court of Chancery of the State of Delaware, after hearing the parties in the action pending before it, and after giving consideration to the proceedings and "Summary Final Decree" of the Circuit Court for Palm Beach County, ruled in an opinion:

1. "Since the purported Trust was created in Delaware and since the assets have been held by the Trustee in Delaware at all times, the 'home' of the Trust is in Delaware and its validity must be determined by the law of Delaware". (R. 148) (119 A. 2d 907).
2. "It is held that the Agreement of 1935 created a valid *inter vivos* Trust. Since the Trust was valid, the exercise of the powers of appointment thereunder by the instruments of 1949 and 1950 were valid * * *. Accordingly, the distributions by Wilmington Trust Company constituted a proper discharge of its duties as Trustee under the Agreement with Mrs. Donner." (R. 155) (119 A. 2d 911)

On January 13, 1955, the Delaware Court entered its final decree which by its terms binds all parties to the litigation, who include all parties to this action, to the declarations, adjudications and determinations thereof. (R. 156).

Appellants then on March 19, 1956 filed in the Supreme Court of Florida a petition requesting the Court to remand the action to the Circuit Court with instructions to dismiss upon the basis of the opinion and order of the Delaware Court, copies of which were attached (R. 135). Said petition recited that a petition for rehearing by certain of the defendants in the Delaware litigation urging that the

Court give full faith and credit to the "Summary Final Decree" of the Circuit Court of Palm Beach County had been denied after hearing.

Argument on the motion to remand was heard by the Supreme Court of Florida on March 27, 1956, at the same time as the hearing on the appeals.

On September 19, 1956, the Supreme Court of Florida filed its opinion denying said motion to remand and holding that the Circuit Court had jurisdiction of all of the defendants named in this action and that the appointments of the trust property were invalid although the trust itself was valid (R. 181).

Appellants filed a petition for rehearing particularly directing the Court's attention to the ^{same} questions presented by this appeal ~~as set forth in paragraph (c) hereof~~ (R. 193). This petition was denied on November 28, 1956 (R. 204) and on the same day the Court granted Appellants' petition to stay its mandate pending the completion of its appeal to this Court (R. 205).

On January 14, 1957, the Supreme Court of the State of Delaware (128 A. 2d 819) affirmed the Court of Chancery of that State (R. 209). A petition for reargument, or, in the alternative for a stay of the mandate of the Delaware Supreme Court to permit appellants to petition this Court for a writ of certiorari, was settled by order of that Court dated February 7, 1957, denying the reargument and granting the stay.

On January 25, 1957, Appellants filed with the Supreme Court of Florida a motion for leave to file an Extraordinary Petition for Rehearing, based on the final determination of the Delaware Supreme Court, attaching a copy of its opinion to the petition (R. 206, 207). The Supreme Court of Florida dismissed this motion by order dated February 18, 1957 (R. 233).

SUMMARY OF ARGUMENT.

Mrs. Donner, a citizen and resident of Pennsylvania, made a contract with Wilmington Trust Company, a corporation which confines its business activities to the State of its origin, Delaware. Under the terms of that contract, Mrs. Donner delivered property to the Trust Company in Delaware and it committed itself to manage and dispose of that property in accordance with the provisions of that contract. The Courts of the State of Florida cannot adjudicate the validity of that contract in the absence of service of legal process on the Trust Company or its voluntary appearance in an action brought for that purpose. Under the terms of that contract, third persons became entitled to beneficial interests on Mrs. Donner's death. These persons were non residents of the State of Florida and the Courts of that State cannot in the absence of legal service or appearance of those persons adjudicate their rights. An attempt by the Florida Court to determine the validity of Mrs. Donner's contract with the Trust Company with neither it nor the beneficiaries joined in the action violates the Due Process Clause of the Constitution of the United States. Mrs. Donner's contract with the Trust Company is a Delaware contract, completely executed, delivered, and administered in the State of Delaware; and its validity is determined by the law of Delaware. The Delaware Supreme Court has decreed that the contract is valid, and the Florida Courts are required by the Constitution of the United States to give full faith and credit to that determination.

ARGUMENT.

I.

The Application by the Florida Courts of the Provisions of Chapter 48, Florida Statutes, Section 48.01 and 48.02, as a Basis for Jurisdiction to Decree the Devolution of Property Outside Its Jurisdiction and in the Hands of a Trustee Who Was Not Personally Served With Process, Who Has Not Appeared in the Proceedings, and Who Has No Place of Business, Has Never Conducted Business and Who Has No Officers, Agents or Representatives in the State of Florida, Violates the Fourteenth Amendment of the Constitution of the United States.

A careful reading of Sections 48.01 and 48.02 of Chapter 48 of the Florida Statutes shows that the legislature in enacting those sections were fully conscious of the Constitutional limitations inherent in such legislation. Paragraphs (1), (2), (3) and (6) are specifically limited to problems arising out of real and personal property "within the jurisdiction of the Court" or debts or obligations "owing by any party upon whom process can be served within this State." Similarly, paragraphs (7), (8) and (9) have to do with execution process within the State. We submit that the provisions of paragraphs (4), (5) and (10) are similarly restricted to property physically in the State or in the hands of a person upon whom process can be served within the State. This Court has settled this point with regard to paragraph (4) which permits service by publication in suits "for divorce or annulment of marriage" in *Armstrong v. Armstrong*, (1956) 350 U. S. 568. In that case, the Florida Court with only service by publication on the nonresident defendant wife, presumed to decree that she was not only not entitled to alimony but that she must return certain stock certificates located in Ohio. In a separate concurring opinion by Mr. Justice Black, in which

the Chief Justice and Justices Douglas and Clark joined, it was stated:

"We believe that Ohio was not compelled to give full faith and credit to the Florida decree denying alimony to Mrs. Armstrong. Our view is based on the absence of power in the Florida Court to render a personal judgment against Mrs. Armstrong depriving her of all right to alimony although she was a nonresident of Florida, had not been personally served with process in that State, and had not appeared as a party."

Paragraph (5) which covers suits "for the construction of any will, deed, contract or other written instrument and for a judicial declaration or enforcement of any legal or equitable right, title, claim, lien or interest thereunder", must be similarly circumscribed to property within the jurisdiction of the Court or in the hands of a person who can be served with process in the State. Consequently, it becomes obvious that when the Florida Court reaches out for property and persons beyond the boundaries of its State, it offends due process. But the Florida Supreme Court, in its opinion, says:

"The Complaint for declaratory judgment in this case was filed for the purpose of determining what passes under the residuary clause of the will * * *"
(R. 183)

It then concluded, without rationalizing:

"Jurisdiction existed by virtue of the will, which had been duly probated in Florida, the testatrix' domiciliary State." (R. 185)

A few homely examples are sufficient to show the fallacy of this conclusion. Suppose a testator who has worked in New York retires to Florida, dies, and in his will, probated in Florida, provides: "I give and bequeath to my

nephew the proceeds of my retirement pension agreement with the Generous Company, whose sole office and place of business is in New York City." Would the Florida Court claim the right to determine a dispute over the amount due under this contract merely because it was mentioned in the Will, without personal service upon, or appearance by, the company? Or would the Florida Court undertake the determination of a wrongful death action covering an accident inflicted outside the State by a nonresident tortfeasor merely because a recovery would pass under the residuary clause of the decedent's will?

The Florida Supreme Court undoubtedly realized the fallacy of its position and attempted to strengthen it by an equally fallacious theory. It said:

"We do not question the validity of the beneficial life estate reserved by the settlor." R.186)¹

* * *

"It is sufficient to observe that in the instant case the last effective acts, if any there were, of the settlor to establish *remainder interests* under the trust were accomplished while she was a Florida domiciliary, and we consider the last powers of appointment, as a republication of the original trust instrument, or as if the trust instrument had been executed while the settlor was domiciled in Florida". (R. 187)

So, the Florida Supreme Court leaves its wholly non-existent jurisdictional base of interpreting a will (which is not only not ambiguous but crystal clear in its meaning) for the equally untenable base of construing its newly-created Florida contract without properly bringing in the other contracting party, namely, the Wilmington Trust Company. And, in the performance of this judicial legerdemain, it had to find the contract valid and republished in order to finally destroy it.

1. Appellees also admit that the trust was valid insofar as the life estate was concerned (R. 201).

(a) **The Wilmington Trust Company, the trustee, is an indispensable party.**

The Circuit Court of Palm Beach County properly held that it had "no jurisdiction over the non-answering defendants", namely, the Trustee and the nonresident beneficiaries and dismissed the action as to them (R. 110, 111). Neither it nor the Supreme Court were willing to come to grips with the question of the absence of indispensable parties. The Circuit Court dismissed Appellant's Petition for Rehearing (R. 112) which directly raised the question, without hearing argument and without comment (R. 120). The Supreme Court contented itself with the conclusions that it had jurisdiction under either the interpretation of a will or the determination of the validity of a contract giving as its only excuse for the absence of the indispensable parties its decision in the case of *Henderson v. Usher*, (1935) 118 Fla. 688, 160 So. 9, saying:

"In *Henderson v. Usher*, supra, 160 So. 9, we upheld constructive service of a citizen of New York, although the trust 'res', consisting entirely of intangible personalty, was physically located in New York and the trust was administered there by the Chase National Bank of New York, as trustee. We held that constructive service was valid in that State of the record because substantive jurisdiction existed in the Florida Court by virtue of construction of a will, which was also involved, the testator having been domiciled in Florida." (R. 191)

With all deference to the Florida Supreme Court's interpretation of its own decision, Appellants pointed out in their petition for rehearing that in the *Henderson* case the trustees voluntarily appeared and submitted themselves to the jurisdiction of the Court, so that the propriety of constructive service was moot (R. 196). The Court noted this, after discussing *Lines v. Lines*, (Pa. 1891) 21 Atl. 809, which held that "a court of equity in this State [Pennsyl-

vania] cannot by its decree take [property] out of the hands of its custodian there [New York] and transfer it to executors in this State", and *Martin v. Martin*, (Pa. 1906) 63 Atl. 1026, which made a similar conclusion, saying:

"* * * While here the trustees come into court seeking advice as to how they should proceed in the administration of the trust incident to its repudiation and election by the primary beneficiary to take a child's part. When they did this, our view is that they constructively brought the res into the Court." (Emphasis added.)

Appellants further pointed out that the case of *Swetland v. Swetland*, (N. J. Eq. 1930) 149 Atl. 50, 153 Atl. 907 upon which the Supreme Court had originally relied in the *Henderson* case (R. 186) and in reaffirming it in this case had been repudiated in *Cutts v. Najdowski*, (N. J. Eq. 1938) 198 Atl. 885 (R. 198). The Florida Supreme Court, without hearing argument, denied the petition for rehearing without comment (R. 204).²

The basic rules of jurisdiction are so well established in *Pennoyer v. Neff*, (1878) 95 U. S. 714, and the long line of authorities citing it that they scarcely need repeating. For the purpose of this argument, Appellant feels justified in citing the secondary authority, 30 C. J. S. 437, as succinctly stating these rules:

"An equity court has no cognizance of a suit in which its decree would be ineffectual because of territorial limits to the reach of its process. No jurisdiction exists unless the parties to be affected are subject to the Court's control, or the res is within the jurisdiction; the Court has jurisdiction whenever the presence of the parties, the res, or a portion of the res within its jurisdiction enables it to make and enforce a just decree."

2. The Delaware Supreme Court found that neither the *Henderson* nor *Swetland* cases were apposite authorities to this case (R. 226).

An analysis of the above in the light of the facts of this case discloses that the Court cannot compel Wilmington Trust Company, the trustee, to take action and it cannot appoint a receiver for the trust assets in Delaware to carry out its mandate. The most that it can do is direct the Executrix to bring suit against the Trustee in Delaware for the recovery of the trust assets. This she has done without success, so that any decree of the Florida Courts, in the absence of a trustee and the res, would be a futility.

This Court held that a trustee was a necessary party to an action testing the validity of a trust in *McArthur v. Scott*, (1885) 113 U. S. 340, 396, saying:

“A trustee who has large powers over the trust estate, and, important duties to perform with respect to it, is a necessary party to a suit brought by a stranger to defeat the trust, and often sufficiently represents the beneficiaries.”

The Florida Supreme Court made a similar finding in *Wilson v. Russ*, (1880) 17 Fla. 691:

“A trustee in whom is vested the legal estate is a necessary party in all proceedings affecting the trust.”³

The Supreme Judicial Court of Massachusetts reached the same conclusion in *Sadler v. Industrial Trust Company*, (1951) 97 N. E. 2d 169, in which the facts were remarkably similar to those in this case:

“The trusts were executed in Rhode Island, and consist entirely of personal property, which was transferred to the trustee by the settlor at the times the trusts were executed. The trustee is a Rhode Island banking corporation with its place of business in Providence in that State, and the trusts were administered entirely in that State. The situs of the trusts is in Rhode Island, where are found the trustee and the

3 See also: *Winn v. Strickland*, (Fla. 1894) 16 So. 606.

trust property, notwithstanding the residence of the beneficiaries in this Commonwealth, and notwithstanding the former residence here of the settlor. * * * *The trustee is accountable only in Rhode Island.* * * * The decree describes the trustee as a necessary party. It is at least that. * * *

“In our opinion, the trustee is an indispensable party to any adjudication of the life beneficiary’s interests under the trust. *Justice requires that the trustee be bound by the declaration and not left free to raise the same question, for example, in an accounting with the same parties at a later date.* * * *

“No jurisdiction to enter a decree in personam against the trustee was acquired by service by registered mail and application. (Citing *Pennoyer v. Neff*, supra.)” (Emphasis supplied.)

The Supreme Court of the State of Delaware in its opinion in the companion case (No. 977 October 1956) said:

“A trustee is also an indispensable party to a suit involving trust property, and in defense of title to the trust property.” (128 A. 2d 834) (R. 230.)

(b) The parties appointed as beneficiaries of the trust are indispensable parties.

Delaware Trust Company, which was appointed to and received \$400,000 of the trust assets as Trustee of two trusts, Bryn Mawr Hospital, appointee of \$10,000, and three servants, who received a total of \$4,000, are all nonresidents of the State of Florida, and none of them was personally served or appeared (R. 55-62). Three other servants, who received a total of \$3,000, were not even named as parties. In the absence of these corporations and parties, the Florida Courts are powerless to give a final and binding decree affecting their interests, particularly in the absence of the Wilmington Trust Company, the Trustee.

This rule was aptly stated by the Supreme Judicial Court of Massachusetts in *Gulda v. Second National Bank*, (1948) 80 N. E. 2d 12, 15 A. L. R. 2d 605, 608, where the trustee was subject to the Court's jurisdiction, but all of the beneficiaries were not.

"In the instant case, however, the very existence of the trust itself * * * is threatened by the plaintiff, and those named as beneficiaries in the said declaration may be adversely and directly affected by the decree which may be entered. Their interests in the property are opposed to those asserted by the plaintiff. They are entitled to be heard in order to protect their rights and should not be compelled to depend on the defense made by the trustee."

(c). There was no res in Florida which could be used as the basis for constructive service.

None of the trust assets have ever been in Florida (R. 106). In their petition for rehearing (R. 193) appellants directed the attention of the Florida Supreme Court to the case of *Findlay v. F. E. C. Railway Company*, (D. C. Fla. 1933) 3 F. Supp. 393, *aff'd.* (C. A. 5) 68 Fed. 2d 540, holding that the Court could not construe the will of a Florida resident where the property was held outside the State by non-resident trustees in the absence of personal service or appearance of the trustees:

"This Court is without power to construe the will, or to adjudicate by a decree in rem the rights, if any, of the railway company in the trust estate, as against these nonresident defendants, or against other non-resident beneficiaries under the will. Even if the residual estate is an equitable asset of the railway company, and even if plaintiffs bonds, through the trust deed, are a lien upon it, there being no res in this jurisdiction, there is no basis upon which this court may

properly direct the conduct of the nonresident trustees with respect to the trust estate. Any attempt to do so would be a pure usurpation of power.” (R. 195)

The Supreme Court of the State of Delaware made the same ruling in the companion case:

“* * * To hold that in the absence of jurisdiction over the *res* in controversy, Florida can compel appearance through substitute service would be a violation of the due process clause of the 14th Amendment. *Pennoyer v. Neff*, 95 U. S. 714, 24 L. Ed. 565 (R. 230, 128 A. 2d 834).”

Finally appellants submit that the Florida Courts were clearly without jurisdiction and that this Court should accept jurisdiction of this appeal and should reverse the Florida Supreme Court and remand with directions to dismiss with costs to appellants.

II.

The Florida Courts Must Give Full Faith and Credit to the Judgments of the Delaware Chancery and Supreme Courts.

If this Court should determine that the Florida Courts have jurisdiction in this action, then appellants submit that this Court should grant certiorari and should find that the Florida Courts are bound by the judgments of the Delaware Courts: Appellant, Elizabeth Donner Hanson, the Executrix, in an effort to bring about a speedy conclusion of the dispute instigated by the filing of this action, impleaded all of the interested parties in an action in the Court of Chancery of the State of Delaware where the trustee, the trust *res*, and the major beneficiaries were located, and where the decree of the Court would be final and binding on the trustee and all of the parties (R. 53). The Court of Chancery and the Supreme Court of the State of Delaware held the trust valid and the delivery of the assets to the

appointed beneficiaries a lawful exercise by the trustee of its duties and obligations under the trust agreement.

In *Roche v. McDonald*, (1928) 275 U. S. 449, this Court said at page 451:

"It is settled by repeated decisions of this Court that the full faith and credit clause of the Constitution requires that the judgment of a State court which had jurisdiction of the parties and the subject matter in suit, shall be given in the courts of every other State the same credit, validity and effect which it has in the State where it was rendered, and be equally conclusive upon the merits; and that only such defenses as would be good to a suit thereon in that State can be relied on in the courts of any other State."

Appellants again direct the Court's attention to the fact that the trust res and trustee were both present in Delaware and absent in Florida and that the Delaware Courts are the only courts which can render a final and binding decree. No court but a Delaware court can render an *in personam* judgment against Wilmington Trust Company, the Trustee, absent its voluntary appearance before it.

The Supreme Court of the State of Delaware, in the companion case (No. 977, Oct. 1957, R. 225, 128 A. 2d 819, 831) so held, saying:

"The demand of full faith and credit for the Florida judgment as the prop for the assertion of personal liability against Wilmington Trust Company is defeated by the fact that Wilmington Trust Company has never been served personally with Florida process; nor has it appeared in any form in the Florida litigation. The recital of these facts is sufficient to require the denial of full faith and credit to the Florida judgment when it is sought to be made the basis for the assertion of personal liability."

This holding follows the teaching of this Court in *Baker v. Baker, Eccles & Co.*, (1916) 242 U. S. 394, 401, where it was said:

"But it is now too well settled to be open to further dispute that the 'full faith and credit' clause and the act of Congress passed pursuant to it do not entitle a judgment in personam to extraterritorial effect if it be made to appear that it was rendered without jurisdiction over the person sought to be bound."⁴

Likewise, no court but the Delaware Court can render an in rem judgment, since the Delaware Court is the only court having jurisdiction of the res.

This Court so found in the case of *Riley v. New York Trust Co.*, (1942) 315 U. S. 343, 353:

"While the Georgia judgment is to have the same faith and credit in Delaware as it does in Georgia, that requirement does not give the Georgia judgment extra-territorial effect upon assets in other states. So far as the assets in Georgia are concerned the Georgia judgment of probate is in rem; so far as it affects personalty beyond the state, it is in personam and can bind only parties thereto or their privies. This is the result of the ruling in *Baker v. Baker, Eccles & Co.*, 242 U. S. 394, 400. Phrased somewhat differently, if the effect of a probate decree in Georgia in personam was to bar a stranger to the decree from later asserting his rights, such a holding would deny procedural due process."

By analogy, the Florida Courts must give full faith and credit to the judgments of the Delaware Courts dealing with assets within their jurisdiction.

4. See also: *International Shoe Co. v. Washington*, (1945) 326 U. S. 310, 316; *May v. Anderson*, (1953) 345 U. S. 528; *Armstrong v. Armstrong*, *supra*.

III.

The Florida Courts in Failing to Apply Delaware Law in the Determination of the Validity of a Delaware Trust Denied Due Process.

The inherent vice of the decisions of the Florida Courts is found in their unwillingness to admit that the only issue in this action is the determination of the validity of a Delaware trust. The will needs no interpretation. The Circuit Court made no effort to interpret it, but boldly proceeded to determine the validity of the powers appointing the property in the trust, justifying its action on the ground that some of the beneficiaries had been personally served and were subject to the Court's jurisdiction (R. 110). The Florida Supreme Court begs the question by saying:

"* * * This determination [of what passes under the residuary clause of the will] requires a study of the trust instrument of March 25, 1935, and the powers of appointment exercised thereunder, to determine whether or not such powers as the testatrix had were 'effectively exercised' under the terms of the will. * * * " (R. 183)

It then concludes:

"* * * This is to be distinguished from a case wherein questions of administration or validity of a purported inter vivos trust arise absent a will or any reference therein." (R. 185)

Appellants have demonstrated herein (pp. 16, 17) that the mere mention of the trust in the will does not give the Florida Courts the right to determine its validity absent the trustee and the trust res. We suggest in passing that if the Florida Court means that the reference to the trust results in its incorporation by reference in the will as a basis for construction, then the appointments as a part of a valid will become valid testamentary dispositions and their validity as a part of the inter vivos trust need not be

decided. *McHardy v. McHardy*, (1857) 7 Fla. 301. We have also pointed out that the Florida Supreme Court has admitted the validity of the trust insofar as the life estate is concerned (R. 186). This valid trust antedated the will and must be construed by the application of Delaware law, and since under Delaware law the powers of appointment merely filled in blanks and became a part of the original trust, they must also be construed by that law. *Wilmington Trust Co. v. Wilmington Trust Co.*, (Del. Supreme Ct. 1942) 24 A. 2d 309, 312, 139 A. L. R. 1117.

The Supreme Court of the State of Delaware found in the companion case:

"* * * We are dealing with a Delaware trust. The trust *res* and trustee are located in Delaware. The entire administration of the trust has been in Delaware. The attack on the validity of this trust raises a question of first impression in Delaware and one of great importance in our law of trusts. To give effect to the Florida judgment would be to permit a sister state to subject a Delaware trust and a Delaware trustee to a rule of law diametrically opposed to the Delaware law." (R. 231, 128 A.2d 835)

In reaching this conclusion, the Supreme Court followed its earlier ruling in *Wilmington Trust Co. v. Wilmington Trust Co.*, *supra*, in which it said:

"* * * The validity of the deed of appointment and of the rights and interests assigned thereunder depend upon the law of the jurisdiction in which the trust had its seat when the power of appointment was exercised."

This rule is now practically universal in its application. The Restatement, Conflict of Laws, provides:

"§ 294(2) The validity of a trust of choses in action created by a settlement or other transaction inter

vivos is determined by the law of the place where the transaction takes place."

"§ 299. The administration of a trust of movables is supervised by the courts of that state *only* in which the administration of the trust is located." (Emphasis supplied.)

As hereinbefore pointed out, the rule has now been changed in New Jersey from that applied in the *Swetland* case, *supra*, by the decision of *Cutts v. Najdowski, supra*, which held:

"The creation of an inter vivos trust in moneys or securities is governed by the laws of the situs of the moneys or securities."

The Supreme Judicial Court of Massachusetts reviews the recent cases in *National Shawmut Bank of Boston v. Cumming*, (1950) 91 N. E. 2d 337, 341:

"The elements entering into the decision as to the law of which State determines the validity of the trust are, on the one hand in Vermont, the settlor's domicile, and, on the other hand in Massachusetts, the presence of the property or its evidences, the completion of the trust agreement by final execution by the trustee, the domicile and the place of business of the trustee, and the settlor's intent that the trust should be administered by the trustee here. The general tendency of authorities elsewhere is away from the adoption of the law of the settlor's domicile where the property, the domicile and place of business of the trustee, and the place of administration intended by the settlor are in another State. (Citing authorities). The situation is unchanged by the fact that the one seeking to set aside the transaction is the widow of the settlor. (Citing cases). We are of opinion that the question of validity is to be determined by the law of this Commonwealth."

The Court of Appeals for the Fifth Circuit reached a similar conclusion in *Warner v. Florida Bank and Trust Co.*, (1947) 160 F. 2d 766, 771:

"The validity of a trust of securities, including shares of stock, is governed by the law of the situs of the securities or the law of the place of the transaction. Matters of administration are determined by the law of the situs or the seat of the trust, and the domicile of the trustee of intangible personal property including shares of stock is usually the seat of the trust."

It also ruled at page 772:

"The fact, therefore, that under Florida law the trust agreement is presumptively void does not prevent a Florida court from applying the law of Minnesota, where the agreement was made and under which law the agreement is presumptively valid."

It is therefore clear that the Florida Supreme Court erred in applying new law created by it in determining the validity of the trust.

This Court has held that failure to apply the law of the situs of the contract is a denial of the due process guaranteed by the Fourteenth Amendment. In *Home Insurance Co. v. Dick*, (1930) 281 U. S. 397, 408, it found that the Texas courts erred in applying Texas law in determining the validity of a contract made in Mexico to be performed either there or in New York, saying:

"All acts relating to the making of the policy were done in Mexico. All in relation to the making of the contracts of reinsurance were done there or in New York. And, likewise, all things in regard to performance were to be done outside of Texas. Neither the Texas laws nor the Texas courts were invoked for any purpose, except by Dick in the bringing of this suit. The fact that Dick's permanent residence was in Texas is without significance. At all times here material he

was physically present and acting in Mexico. Texas was therefore without power to affect the terms of the contracts so made."

The analogy of the facts in that case to those in this action is immediately apparent. Here the trust was executed in Delaware and it and the powers of appointment became effective upon delivery to the trustee in Delaware (R. 104). The complete administration of the trust including the delivery of the property to the appointees of the powers was in Delaware (R. 105). The fact that Mrs. Donner became a resident of Florida is not pertinent.

In the *Home Insurance* case, the appellee contended that this Court lacked jurisdiction of the action "because the errors assigned involve only questions of local laws and of conflict of laws," thereby bringing into focus the conclusion of this Court that due process is violated by failure of a State Court to apply the proper State law.

IV.

The Florida Supreme Court Erred in Reaching a Conclusion Which Is Totally Lacking in Comity and Is Unenforceable.

Appellants again direct this Court's attention to the fact that the trustee and the trust res are in Delaware. The Supreme Court of the State of Delaware has held the trust valid and has concluded:

"* * * It is our duty to apply Delaware law to controversies involving property located in Delaware, and not to relinquish that duty to the courts of a State having at best only a shadowy pretense of jurisdiction. * * *"

Appellant Hanson, the executrix, was charged by the complaint in this action with a failure "to take any steps" to "capture assets" belonging to the estate (R. 11). She took the only step which she could to recover these assets

by bringing suit in the State where the assets were (R. 54) only to be charged with "bad faith" for doing what she was charged with not doing (R. 69). In fact, appellees charge that the—

"* * * proceeding in Delaware was merely a sham and was filed by [her] in order to try to deprive the Florida Courts of jurisdiction and for the purpose of trying to lose said case in Delaware and then claim in the Florida Courts that she could not recover said trust assets. If she can lose the case in Delaware and win the case in Florida, then her two children will get the benefits of most of said trust assets instead of appellants. * * * This illustrates the inconsistent position which she occupies in the case and why she is not an impartial executrix and trustee and why she could not have initiated the Delaware case in good faith." (R. 175)

Appellants submit that there is no evidence in the record to justify such charges and that any inconsistencies in this action are those of the appellees. The implied charge of fraud on the Delaware Court may be an omen that appellees propose to bring a personal action against appellant Hanson to surcharge her for failure to do what she has in good faith attempted to do. Consequently, this Court in an effort to bring a conclusion to this litigation in the interest of justice should resolve this "headlong collision between the States" in appellants' favor.

CONCLUSION.

Appellants believe that they are entitled to the following relief:

(a) This Court should grant their appeal from the judgment of the Supreme Court of Florida dated September 19, 1956, and should reverse the same with directions to said Court to remand this action to the Circuit Court of

Palm Beach with an order to dismiss this action with costs to the appellants, or, in the alternative, that

(b) This Court should grant certiorari to the judgment of the Supreme Court of Florida dated September 19, 1956, and reverse the same, with directions to said Court to remand this action to the Circuit Court of Palm Beach County with an order to dismiss this action with costs to the appellants.

Respectfully submitted,

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FILED

MAR 7 1958

JOHN T. FEY, Clerk

IN THE

Supreme Court of the United States**October Term, 1957.****No. 107.**

ELIZABETH DONNER HANSON, Individually, as Executrix of the Will of Dora Browning Donner, Deceased, and as Guardian ad Litem for **JOSEPH DONNER WINSOR** and **DONNER HANSON**, and **WILLIAM DONNER ROOSEVELT**, Individually,

Appellants,

v.

KATHERINE N. R. DENCKLA, Individually, and **ELWYN L. MIDDLETON**, as Guardian of the property of **DOROTHY BROWNING STEWART**, Also Known as **DOROTHY B. STEWART** and **DOROTHY B. RODGERS STEWART**, an Incompetent Person,

*Appellees.***APPELLANTS' REPLY BRIEF.**

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INDEX TO REPLY BRIEF.

	Page
GENERAL COMMENTS	1
ANSWER TO APPELLEES' POINTS	4
Point I—This Court Has Jurisdiction of the Appeal	4
1. The Appeal Presents Substantial Federal Questions	4
2. The Federal Questions Were Timely and Properly Raised and Expressly Passed Upon	5
3. The Judgment Appealed From Rests on an Ade- quate Federal Basis	6
Point II—The Florida Courts Had No Jurisdiction of the Trust Res or Indispensable Parties	6
Point III—The Decree of the Florida Supreme Court Should Receive No Faith or Credit	10

TABLE OF CASES.

	Page
Ake v. Chancery, (1943) 152 Fla. 677, 13 So. 2d 6	7
Demorest v. City Bank Farmers Trust Co., (1944) 321 U. S. 36	7, 10
International Shoe Company v. Washington, (1945) 326 U. S. 310	7, 8
Liberty Warehouse Co. v. Burley Tobacco Growers Co-Op Mar- keting Association, (1928) 276 U. S. 71	4
McGee v. International Life Ins., 50 Oct. T. 1957 (decided 12/16/57)	7
Mullane v. Central Hanover Bank & Trust Co., (1950) 339 U. S. 306	7, 10
Riley v. New York Trust Co., 315 U. S. 343	4
Rubin v. Irving Trust Co., (N. Y. 1952) 113 N. E. 2d 424	7, 9
Smith v. Indiana, (1903) 191 U. S. 138	4

APPELLANTS' REPLY BRIEF.

GENERAL COMMENTS.

Appellees' brief seeks to perpetuate the fallacy of the Florida Supreme Court decision, namely, that the Florida Courts had jurisdiction of this action by reason of its probate of Mrs. Donner's will. We reiterate that no action was necessary "to determine what personal property passed under the residuary clause" (A. B. 1)¹ of Mrs. Donner's will for it is crystal clear that all property which she had not disposed of in her lifetime passed under that will. The only question for decision by any court was whether the powers appointing property in a Delaware Trust were valid. That question was solely for the Delaware Courts since it was there and only there that the Trustee could be made to account or a receiver appointed for the trust assets which have never left that State.

Appellees attempt to befog that issue by charging Mrs. Hanson with bad faith and by criticizing her for having many "hats" (A. B. 2). Mrs. Hanson was entrusted by her mother, when she named her executrix of her estate, with the *one and paramount duty of seeing that her property was disposed of in accordance with her expressed wishes and intent*. Her every act has been consistent with that trust.

Appellees, although fully advised of the extent and nature of Mrs. Donner's estate and her trust immediately following her death (R. 76, 79), made no claims that the powers of appointment were invalid or demands that the Executrix recover the appointed property until they filed their complaint herein more than fourteen months after the death of Mrs. Donner.

1. The following references are used throughout this brief, Appellees' Brief: A. B.; Record: R; Appellants' Main Brief: M. B.

Although fully advised of all the facts at the time of the filing of the complaint, Appellees did not oppose Mrs. Hanson's appointment as guardian ad litem for her minor children, Joseph and Donner, and we submit that the Florida equity court would not have appointed her if it had considered that she would thereby be faced with conflicting responsibilities (R. 39).

Finally, after the Florida Courts (both Trial and Supreme) had determined to delay the determination of the fundamental question of jurisdiction, Mrs. Hanson attempted to perform the "duty" charged to her by Appellees "to capture" the Delaware assets by bringing suit in Delaware. Appellees succeeded in having the Florida Trial Court enjoin her, a rather futile act since her Delaware action was simply an interpleader, until Appellees' children, not only appeared and defended but filed Cross-Claims asking for money judgments against the Wilmington Trust Company and Delaware Trust Company and a counterclaim for \$417,000.00 against the Executrix (A. 66). When Mrs. Hanson attempted to defend against the counterclaim, Appellees cited her for contempt of the Florida injunction. They further attempted to impede the progress of the Delaware action by failing to appear and answer (R. 176) and by causing their children to file a motion to dismiss which was later abandoned (R. 157, 158).

Appellees state that Mrs. Hanson filed her action in Delaware because she was dissatisfied with the findings of the Florida Court. *The fact is that at the time of the filing of that action no finding had been made or action taken by the Florida Courts other than the deference of the determination of the question of jurisdiction until hearing on the merits.* They further had the audacity to charge in the Supreme Court of Florida that the Delaware action "was merely a sham and was filed by [Mrs. Hanson] in order to deprive the Florida Courts of jurisdiction and for the purpose of trying to lose the case in Delaware and then claim in the Florida Courts that she could not recover said trust assets" (R. 175). In addressing this

Court they temper their charge by merely characterizing appellants' action as "an unconscionable attempt on the part of appellants to oust the Florida Courts of the power to administer the estate of a Florida citizen * * * (A. B. 13). The record does not support this charge. On the contrary it demonstrates that Mrs. Hanson at all times strove to carry out her trust to see that her mother's property reached the persons chosen by her mother to receive it as expeditiously as possible.

On the other side we find that Appellees were unwilling to defend in the Delaware Court but used their children, whose interests are remote, to delay the progress of the Delaware action in their self-initiated race for an early Florida decision (R. 157). Finally, Appellees admit that the Florida judgment is of itself unenforceable but will require ancillary proceedings saying:

"It left open, to be later followed up if desired by any party, any necessary proceedings to implement the decision. Conceivably such later proceedings might mean additional litigation in Florida or *elsewhere*,² to give effect to the *declaration of rights*, but they are not now before this court or the courts below." (A. B. 8) (Emphasis supplied.)

This language points up the whole vice of Appellees' position. Necessary parties were absent to the Florida proceedings. These parties are bound by the judgment of the Delaware Courts applying Delaware law to a Delaware trust which this Court will not review. Consequently, the decision of the Florida Supreme Court is a decision *in vacuo*.

Here, we point out, Appellees subscribe to our plea that this Court in its determination of this appeal put an end to this litigation when they say under the

2. Where, but Delaware?

heading of "Full Faith and Credit" citing *Riley v. New York Trust Co.*, 315 U. S. 343:

"The requirements of substantial justice are that a matter having once been litigated between parties ought to be laid to rest forever." (A. B. 77.)

The matter was *fully* litigated with *all* parties present in *Delaware* whose jurisdiction as to both person and property has not been questioned and the judgments of the Court of that State are final and binding on all parties. Appellees, realizing this, have threatened to surcharge Mrs. Hanson continually throughout the proceedings.

ANSWER TO APPELLEES POINTS.

We now categorically demonstrate the fallacies of the points made in Appellees brief:

POINT I.

THIS COURT HAS JURISDICTION OF THE APPEAL.

1. The Appeal Presents Substantial Federal Questions.

The Florida Supreme Court by its assertion of jurisdiction over non-resident *indispensable parties* through purported service under the provisions of Florida Statutes (1953) 48.01 and 48.02, under the guise of construing an *unambiguous* will, is attempting to take Appellants' and the non-residents' property without extending to them the due process guaranteed to them by the Fourteenth Amendment.

The *Liberty Warehouse* and *Smith*³ decisions of this Court relied on by Appellees (A. B. 7) are not concerned with the absence of *indispensable parties* and are not ap-

3. *Liberty Warehouse Co. v. Burley Tobacco Growers Co-op Marketing Association*, (1928), 276 U. S. 71, *Smith v. Indiana*, (1903) 491 U. S. 138.

plicable to this appeal (M. B. 20-22, Steel Brief No. 177, 21). We submit that the Florida Supreme Court must have recognized that in the absence of Wilmington Trust Company and the non-resident appointees, its judgment would be futile, and for that reason it necessarily had to reverse the Trial Court's decision that it had no jurisdiction over these parties in order to reach its end result.

Finally, Appellees ignore the teachings of this Court that failure to apply the proper state law is a violation of due process (M. B. 26, Steel Brief 117, 28).

2. The Federal Questions Were Timely and Properly Raised and Expressly Passed Upon.

We again point out that the jurisdiction of the Florida Court was raised in Appellants' first pleading and throughout the proceedings. When, on April 5, 1954, ruling on their motion to dismiss was deferred until the hearing on the merits, they petitioned the Florida Supreme Court for certiorari, without success. The Court's jurisdiction was then raised as a separate defense in their answer and in their separate motion to stay the action during the pendency of the Delaware action. When this motion was denied on August 25, 1954, they again petitioned the Supreme Court for certiorari, without success. At the hearing on the merits the question was argued and decided by the Trial Court which held in its Summary Final Decree dated January 14, 1955 that it had no jurisdiction over the Trustee, the trust res, or the non-resident appointees. It was re-argued before the Trial Court in an effort to convince that court that it could not render a final enforceable decree in the absence of indispensable parties and the trust res. It, and the further questions of the Constitutional right to full faith and credit of the judgment of the Delaware Courts, were argued before the Supreme Court on March 27, 1956, and were ruled upon by that court in its opinion of September 19, 1956. Finally,

the Federal questions raised in this appeal were again presented to the Supreme Court in Appellants' petition for rehearing which was denied by order of that Court dated November 28, 1956, which by its terms recites that the petition "has been considered".

3. The Judgment Appealed From Rests on an Adequate Federal Basis.

Appellants have bottomed this appeal on three individually adequate Federal grounds:

(a) Lack of due process under the Fourteenth Amendment.

(b) Failure of the Florida Courts to give full faith and credit to the judgment of the Delaware Courts in violation of Article Fourth of the Constitution.

(c) Failure to apply the proper state law in violation of the Fourteenth Amendment.

We submit that if this Court should consider that Appellants could not independently raise the question of the Florida court's jurisdiction over absent *indispensable parties*, then this Court should grant certiorari under the provisions of 28 U. S. C., Sec. 2103.

POINT II.

THE FLORIDA COURTS HAD NO JURISDICTION OF THE TRUST RES OR INDISPENSABLE PARTIES.

Appellees, in their argument under this point, again reiterate the fallacy of their whole position, namely that the will is the res and the panacea of all jurisdictional problems in this action. We again emphasize that the only res which commands the attention of any court is the trust fund which is in the hands of a Delaware Trustee in Dela-

ware.⁴ The Trustee is, as we have demonstrated, an indispensable party and could not be reached by either personal or substituted process in Florida.

Appellees are not aided by Chapter 87, Florida Statutes providing for declaratory judgments, since the Florida Supreme Court has determined in *Ake v. Chancery* (1943) 152 Fla. 677, 13 So. 2d 6, in which the plaintiff attempted to justify constructive service against a non-resident defendant on the ground that declaratory relief was sought, that:

"Furthermore a declaratory decree must be predicated on a claim supported by a rem."

Appellees seek solace in the decisions of this Court in *McGee v. International Life Ins.*, 50 Oct. T. 1957 (decided 12/16/57), *International Shoe Company v. Washington* (1945), 326 U. S. 310 and *Mullane v. Central Hanover Bank & Trust Co.* (1950) 339 U. S. 306.⁵ We submit that these decisions were bottomed on clearly distinguishable facts from those in this action but when properly applied to the facts in this action support Appellants' position. In the McGee decision this Court after referring to the requirement set forth in the International Shoe decision that a

4. Appellees again attempt to vitalize their position by pointing out that the Executrix included the trust assets in the estate's inventory and appraisal (AB 10). This was for tax purposes, was so explained (R. 78) and was summarily disposed of by the Florida Trial Court (R. 110).

5. *Demorest v. City Bank Farmers Trust Co.*, (1944) 321 U. S. 36 and *Rubin v. Irving Trust Co.*, (N. Y. 1952) 113 N. E. 2d 424 are not authorities for the statement for which they are cited. *Demorest* held that New York had the right to devise new and reasonable directions to Trustees of New York trusts pointing out (as is true of Delaware in this case) that "under the law of New York the whole legal estate vests in the trustee for the purpose of the trust". *Rubin* merely held that "a contract to make or refrain from altering a will amounts for all practical purposes to a testamentary disposition". In this action a validly executed and existing trust is involved, a fact which even the Florida Supreme Court was forced to admit insofar as it created the life estate in Mrs. Donner.

defendant "must have certain minimum contacts with it [the forum State] such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice,' " held in substance that a non-resident insurance company selling insurance by mail to a small policy holder in California had established ~~such~~ minimum contacts as would permit it to be constitutionally served under a statute of that state permitting notice of suit on such insurance policies by mail. The *International Shoe* case turned largely on the amount of business and the character of the representation which the company had in the state. In its decision in the latter case this Court pointed out a consideration which is significant in this action, namely the weighing of conveniences saying:

"* * * An estimate of the 'inconveniences' which would result to the corporation from a trial away from its 'home' or principal place of business is relevant in this connection."

Wilmington Trust Company is a Delaware company, the activities of which are centered in the State of Delaware, are limited by its laws and are supervised by its agencies. In this action it is the trustee of a trust which has its "home" in Delaware and as such it is subject to the control of the Delaware Chancery Court. It has no contact with Florida either directly or indirectly, and Florida has no process by which it can control its activities. The Delaware Chancellor properly held:

"Since the purported Trust was created in Delaware and since the assets have been held by the Trustee in Delaware at all times, the 'home' of the Trust is in Delaware and its validity must be determined by the law of Delaware" (R. 148).

The finding of the Delaware Chancellor finds support in the decision of this Court in the *Mullane* case, in which it said:

"* * * It is sufficient to observe that whatever the technical definition of its chosen procedure, the interest of each state in providing means to close trusts which exist by the grace of its laws and are administered under the supervision of its courts is so insistent and rooted in custom as to establish beyond doubt the right of its courts to determine the interest of all claimants, resident or non-resident provided its procedure accords full opportunity to appear and be heard."

The Delaware Trust Company as Trustee and the remaining appointees of the trust assets are equally indispensable parties to the decision of the validity of the trust and none of them possesses even minimum contacts with Florida (M. B. 21).⁶

Finally appellees point up the infirmity of their position when they argue that Appellants would have this Court hold that the Delaware Courts could overrule the Florida Courts on "practical administration problems of a Florida estate of a Florida decedent" (A. B. 10). This action does not involve administration problems and in fact there are none. The Federal Estate Tax Law requires the assets of a revocable trust to be included in the gross estate for purpose of taxation. The Florida Estate Tax Law requires the payment to that State of the amount of the credit allowable for the payment of State taxes under the Federal Estate Tax Law. The executrix concedes that the trust assets should be excluded in fixing her attorneys and her fees, (R. 75) and it is apparent that Florida creditors could not reach assets in Delaware which do not belong to the estate. The assets are not a part of "a Florida Estate" if they pass under a valid Delaware Trust. To again repeat, the validity of the Delaware Trust is the only ques-

6. The "center of gravity" theory of conflicts applied by the New York Court of Appeals in the Rubin case cited by Appellees (note 3, *supra*) would leave no doubt of the fact that the law of Delaware is the proper law and Delaware the proper forum for the determination of the validity of the trust.

tion for decision and this Court has held in both the Demorest and Mullane cases cited by Appellees, that the decision of the state which is the "home" of the trust is controlling.

POINT III.

THE DECREE OF THE FLORIDA SUPREME COURT SHOULD RECEIVE NO FAITH OR CREDIT.

Under this point, Appellees, after insisting in Point I that Appellants' Questions iv (refusal of the Florida Supreme Court to apply Delaware Law), v (holding of that Court that the trust was valid and was republished in Florida by the questioned appointments for the sole purpose of acquiring jurisdiction to declare the trust invalid) and vi (reaching by that Court of a decision which is lacking in comity and unenforceable) "are clearly matters of state law", inconsistently argue the question of the validity of the trust. We submit that the "disquisition" of the Florida Supreme Court is completely meaningless and ineffective because of its lack of jurisdiction as well as its inability to enforce its decree. In passing, however, we point to an example of the "double talk" which Appellees have used continuously throughout this action. They say:

"Thus, the donor-testatrix, focused all her dispositions in her will and made Florida her domiciliary State * * * so that full devolution of her property might take place according to her written directions." (Emphasis supplied.)

but their every effort has been to thwart the *written directions* and the expressed wishes and desires of Mrs. Donner in disposing of her property.

We submit that the strained arguments of Appellees in their attempt to destroy the trust and the powers appointing its property fail hopelessly when measured by the

rules pronounced by the Delaware Courts, the jurisdiction of which is unquestioned, in applying Delaware Law to a Delaware Trust.

Respectfully submitted,

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IN THE

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JOHN T. FEY, Clerk

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1957

No. ~~107~~ 107.

ELIZABETH DONNER HANSON, Individually, As Executrix of the Will of Dora Browning Donner, Deceased; and As Guardian ad Litem for JOSEPH DONNER WINSOR and DONNER HANSON, and WILLIAM DONNER ROOSEVELT, Individually, *Appellants*,

vs.

KATHERINE N. R. DENCKLA, Individually, and ELWYN L. MIDDLETON, As Guardian of the Property of DOROTHY BROWNING STEWART, Also Known As DOROTHY B. STEWART and DOROTHY B. RODGERS STEWART, an Incompetent Person, *Appellees*.

MOTION OF APPELLEES TO DISMISS APPEAL AND BRIEF IN SUPPORT THEREOF.

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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1956.

No. _____

ELIZABETH DONNER HANSON, Individually, As Executrix of the Will of Dora Browning Donner, Deceased, and As Guardian ad Litem for JOSEPH DONNER WINSOR and DONNER HANSON, and WILLIAM DONNER ROOSEVELT, Individually, *Appellants*,

VS.

KATHERINE N. R. DENCKLA, Individually, and ELWYN L. MIDDLETON, As Guardian of the Property of DOROTHY BROWNING STEWART, Also Known As DOROTHY B. STEWART and DOROTHY B. RODGERS STEWART, an Incompetent Person, *Appellees*.

**MOTION OF APPELLEES TO DISMISS APPEAL AND
BRIEF IN SUPPORT THEREOF.**

The appellees, Katherine N. R. Denckla, individually, and Elwyn L. Middleton, as guardian of the property of Dorothy Browning Stewart, also known as Dorothy B. Stewart and Dorothy B. Rodgers Stewart, an incompetent

person, move the court to dismiss the appeal on the three grounds hereinafter stated. Before presenting such grounds, and in the interests of accuracy, an error should be pointed out in appellants' statement of the Nature of the Proceedings as contained in appellants' Jurisdictional Statement. (Appellants have made this error so often in the course of this litigation that at this point it is presumed to be intentional.)

The suit filed by appellees in the trial court was not "an action * * * to determine the validity of the exercise of a power of appointment reserved by Mrs. Dora B. Donner," as stated by appellants on page 2 of their Jurisdictional Statement and elsewhere therein. The prayer of the complaint filed in the trial court makes this obvious. Even the Delaware Supreme Court so found as did the Supreme Court of Florida.¹ Therefore, in fact, the action filed by appellees in the trial court had as its sole purpose the determination of what property passed under the will of Mrs. Donner—an *in rem* type of proceeding permitted under the laws of every one of the forty-eight states. Obviously, the Florida courts were the only tribunals with power to determine such a question since it involved the construction of rights under the will of a Florida citizen, probate of which was pending in a Florida court, and the executrix of which was the appellant Hanson, also a Florida citizen, serving by appointment of a Florida court.

With this comment, we proceed to a statement of the grounds upon which this motion to dismiss the appeal is based.

¹See second paragraph of the Delaware Supreme Court opinion, p. 23a, appellants' Jurisdictional Statement. The Florida Supreme Court similarly found, p. 6a, *Id.*

1. The Appeal Does Not Present Any Substantial Federal Questions.

No argument is required to show conclusively that questions iv, v, and vi, raised by appellants on page 8 of their Jurisdictional Statement, are purely and simply matters of state law, with no federal constitutional significance.

Appellants' questions i, ii, and iii, stated on pages 7 and 8 of their Jurisdictional Statement, on the surface point up federal constitutional matters. However, cursory examination shows they too are without any actual substance.

In essence, as to questions i and ii, Hanson, who is the sole appellant, but wearing three hats herein, and who is a Florida citizen, the Florida executrix of the Florida will of a Florida decedent, serving by appointment of a Florida court, complains because of alleged federal constitutional infirmities in the service upon other co-defendants—the Delaware Trust Companies—without in any fashion charging any federal constitutional infirmity in the personal service upon her. She is the same person who, dissatisfied with the findings of the Florida court as to what passes under the will of which she is the executrix, runs off to Delaware, files a new suit there, hoping to get another result, only to be enjoined by the Florida court from proceeding further in Delaware; she then used her children, also Florida residents and parties in the Florida proceedings to move along the Delaware litigation, solely in an effort to defeat the Florida courts in a proper determination of questions about the very will under which she acts as an officer of the Florida courts.

Under such a state of facts, it is very plain that her standing here is not only without substance, but is com-

pletely frivolous, and dangerously close to practical contempt of the Florida courts by whose appointment she acts as fiduciary.

It is elemental that the Supreme Court of the United States will not assume jurisdiction of a case where the party invoking that jurisdiction has no personal interest but does so in the interests of a third party. Here Hanson, although not attacking the jurisdiction of the Florida courts as to her, says those courts could not validly, under federal constitutional principles, obtain jurisdiction over two of her co-defendants by constructive service, therefore, says she, she has a right to come to this court and complain even though her co-defendants are silent and have not appealed.

Such is not the law. *Liberty Warehouse Co. v. Burley Tobacco Growers' Co-op Marketing Ass'n, Ky.*, 1928, 48 S. Ct. 291, 276 U. S. 71, 72 L. Ed. 473; *Smith v. Indiana, Ind.*, 1903, 24 S. Ct. 51, 191 U. S. 138, 48 L. Ed. 125. If the co-defendants—the Delaware Trust Companies—conceive their federal constitutional rights are jeopardized, they have a remedy, but a third party, Hanson here, cannot back into this court of limited jurisdiction riding on the alleged rights of others.

Hanson's complaint about full faith and credit is equally devoid of merit. Succinctly stated, appellant Hanson, with considerable "tongue in-cheek" candor, argues that the Florida courts, including its court of last resort, having ruled on a matter determining what intangible personal property passes under the will of a Florida decedent, under probate in a Florida court wherein Hanson, a Florida citizen, is the executrix appointed by a Florida court, must recede from such ruling because a *nisi prius* court in Delaware reaches a contrary conclusion in an

action commenced by Hanson long after the Florida trial courts had assumed jurisdiction to determine what passed under the will of her mother. In other words, for example, Hanson says, in effect, the Delaware court's view as to what estate assets are subject to the burden of inheritance taxes is binding on the Florida courts where such will is under domiciliary probate. Palpably, appellants' question iii is frivolous and altogether without substance.²

Appellant Hanson on page 3 of her Jurisdictional Statement cites certain cases she believes sustain the jurisdiction of this court to hear this appeal. The cases include, among others, the Delaware decision in the litigation she herself brought and which she was enjoined from continuing. Such a decision is of little force or virtue as an authority supporting the jurisdiction of the Supreme Court of the United States herein. The other cases she cites are entirely inapplicable here because they do not concern proceedings to determine what passes under a will, as did the case before the lower court here, but are rather direct attacks on validity of trusts or exercises of powers of appointment. In citing such cases, Hanson makes the same intentional misconstruction of the purpose of the litigation below commented upon in the beginning of this motion and brief.

²Despite her now insistence that the Florida courts have no jurisdiction to say whether or not the trust assets in question pass under her mother's will, Hanson, before appellees' suit was filed in the trial court, had listed them as assets of the Florida estate and she and her attorneys had petitioned the Florida probate court for fees based upon their inclusion in the assets of the Florida estate!

2. The Federal Questions Sought to Be Reviewed Were Not Timely or Properly Raised or Expressly Passed On.

While it is true the appellants, in their petition for rehearing filed in the Supreme Court of Florida, raised substantially the same matters as presented in their questions i, ii and iii, pages 7 and 8 of their Jurisdictional Statement herein, such questions were not passed upon by the Supreme Court of Florida since the petition for rehearing was denied without comment. In addition, the law is well settled that raising such federal constitutional grounds for the first time in a petition for rehearing in the state court of last resort, comes too late. *Spies v. Illinois*, Ill. 1887, 8 S. Ct. 21, 123 U. S. 131, 31 L. Ed. 80. Also, *Bolin v. Nebraska*, Neb. 1900, 20 S. Ct. 287, 176 U. S. 83, 44 L. Ed. 382; *Herndon v. Georgia*, Ga. 1935, 55 S. Ct. 794, 295 U. S. 441, 79 L. Ed. 1530, reh. den. 56 S. Ct. 82, 296 U. S. 661, 80 L. Ed. 471.

3. The Judgment from Which the Appeal Is Taken Rests on an Adequate Non-Federal Basis.

The controversy below is a routine inquiry into what passed under the Florida will of a Florida decedent, wherein another Florida citizen, appellant herein, was the executrix duly appointed by a Florida court. Such *in rem* actions, usually in the form of declaratory decree proceedings, as here, are common in all states, and are useful vehicles for the orderly administration of estates. The judgment below resulted in nothing more than a judicial declaration of what property passed under the will of the decedent. There was no money judgment against any party. It left open, to be later followed up if desired by any party, any necessary proceedings to implement the decision. Conceivably, such later proceedings will mean

additional litigation in Florida, or elsewhere, to give effect to the declaration of rights, but they are not now before this court or the courts below. Florida law, and Florida law alone, was involved in the proceedings below, and it is not the function or intent of the Supreme Court of the United States to take part in disputes as to the application of Florida law by Florida courts. *U. S. v. Hastings*, 1935, 56 S. Ct. 218, 296 U. S. 188, 80 L. Ed. 148; *Nickel v. Cole*, Nev. 1921, 41 S. Ct. 467, 256 U. S. 222, 65 L. Ed. 900; *Minneapolis, etc., R. Co. v. Washburn Lignite Coal Co.*, 1920, 41 S. Ct. 140, 254 U. S. 370, 65 L. Ed. 310.

Wherefore, the appellees respectfully move that the appeal herein be dismissed:

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DEC 26 1957

JOHN T. REY, Clerk

IN THE
Supreme Court of the United States

OCTOBER TERM, 1957

No. 107

ELIZABETH DONNER HANSON, Individually, As Executrix of
the Will of Dora Browning Donner, Deceased, and As
Guardian ad Litem for JOSEPH DONNER WINSOR and
DONNER HANSON, and WILLIAM DONNER ROOSEVELT,
Individually, *Appellants,*

vs.

KATHERINE N. R. DENCILA, Individually, and ELWYN L.
MIDDLETON, As Guardian of the Property of DOROTHY
BROWNING STEWART, Also Known As DOROTHY B. STEW-
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Person, *Appellees.*

BRIEF OF APPELLEES

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	PAGE
QUESTIONS PRESENTED FOR REVIEW	1
STATEMENT OF THE CASE	1
POINT I. This Court has no jurisdiction of the appeal	5
1. The appeal does not present any substantial federal questions	5
2. The federal questions sought to be reviewed were not timely or properly raised or ex- pressly passed on	8
3. The judgment from which the appeal is taken does not rest on an adequate federal basis..	8
POINT II. The Florida Courts below had complete jurisdiction of the subject matter and of all neces- sary parties	9
POINT III. The decree of the Florida Supreme Court is correct in all respects and should be given full faith and credit	13
Full Faith and Credit	17
CONCLUSION	18

TABLE OF CASES CITED

Argile v. Fulton, 295 Ill. 569, 129 N. E. 526	14
Bollin v. Nebraska, 176 U. S. 83	8
Demorest v. City Bank Farmers T. Co., 321 U. S. 36..	9
Forsythe v. Spielberg, (Fla.) 86 So. 2d 427	4
Harber v. Harber, 152 Ga. 78, 108 S. E. 520	14
Hendon v. Georgia, 295 U. S. 441; reh. den. 296 U. S. 661	8
International Shoe Co. v. Washington, 326 U. S. 310..	12

	PAGE
Leonard v. Campbell, 138 Fla. 405, 189 So. 839.....	14
Liberty Warehouse Co. v. Burley Tobacco Growers' Co-op Marketing Ass'n., 276 U. S. 71.....	7
McGee v. International Life Ins. Co.—U.S.—No. 50, October Term 1957.....	10
Minneapolis, etc. R. Co. v. Washburn Lignite Coal Co., 254 U. S. 370.....	9
Mullane v. Central Hanover Bank & Trust Co., 339 U. S. 306, 313.....	12
Nickel v. Cole, 256 U. S. 222.....	9
Pengelly's Estate 97A 2d 844, 374 Pa. 358.....	14
Pennoyer v. Neff, 95 U. S. 714.....	11
Riley v. New York Trust Co., 315 U. S. 343.....	17
Rodgers v. Rodgers, (Miss.) 67 So. 2d 698.....	14
Rubin v. Irving Trust Co., 305 N. Y. 288.....	9
Smith v. Indiana, 191 U. S. 138.....	7
Spies v. Illinois, 123 U. S. 131.....	8
U. S. v. Hastings, 296 U. S. 188.....	9
Williams v. Williams, 149 Fla. 454, 6 So. 2d 275.....	14

Texts Cited

Bogert, The Law of Trusts and Trustees, Vols. 1; 3, Part I	13
Page on Wills, Lifetime Edition, Vol. I.....	15

Table of Statutes

Florida Statutes, Chapter 87 (Appendix).....	7
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Questions Presented for Review

The real questions herein are as follows:

1. Does this Court have jurisdiction of this appeal?
2. Did the Florida Courts have jurisdiction below of the subject matter and of the necessary parties?
3. Was the decree of the Florida Supreme Court correct and is it entitled to full faith and credit?

Statement of the Case

We deem it essential that the appellants' statement of the case as contained in their brief be corrected and supplemented.

This action was *not* brought to determine the validity of the exercise of a power of appointment reserved in an *inter vivos* instrument purporting to create a trust. (The so-called trust is in effect no more than an agency agreement).

The action was brought to determine what personal property passed under the residuary clause of a Florida decedent's will then under probate in a Florida court (Florida Statutes, Chap. 87, Appendix, *et. al.*). Appellant Hanson, also a Florida citizen, was domiciliary executrix.

In her Florida estate inventory, appellant Hanson had listed some \$1,390,000 worth of assets of the decedent in her hands, including the trust assets (R. 74-90). Appellees claim that all of this passed under the residuary clause of the decedent's will (R. 13-14) as follows:

- a. One-half to the defendant, Delaware Trust Co. as trustee for the benefit of the appellee Denckla, and
- b. One-half to appellant, Hanson, as trustee for the benefit of the ward of the appellee Middleton.

Appellant Hanson claims that \$400,000. of those assets were appointed to trustees of two other *inter vivos* trusts for the benefit of said appellant's children, and that after certain other minor appointments, it was only the balance which was appointed to appellant Hanson as executrix of the will of Mrs. Donner, the trustor. This so-called first power of appointment, which is actually a purported exercise of a power (R. 31-34), was dated December 3, 1949, the same date as decedent's will, but did not become effective according to the original trust indenture (R. 18) until December 21, 1949, the date of its delivery to the Wilmington Trust Company (R. 35). It is this \$400,000. which the appellant Hanson, under her hat as executrix, sought in Delaware to have the Court declare validly appointed to said other trusts for the benefit of her children, while at the same time she also was undertaking to pay the estate tax on that \$400,000. out of Florida estate assets in her hands as such executrix (R. 13).

All persons who might be interested in determining the question of what passed under the residuary clause of the will were made defendants to the action including:

The appellant, individually and as executrix of her mother's estate;

Delaware Trust Company, as Trustee, one of the two residuary legatees, being also the trustee named in the exercise of the power of appointment;

The beneficiaries named in the residuary trust;

The beneficiaries named in the trusts referred to in the exercise of the power of appointment;

The individuals who were to get the \$17,000 referred to in the same exercise;¹

1. \$1,000 each was given to any unnamed servant who might have been in decedent's employment for more than two years at her death. Appellants say there were three who qualified and complain because they were not made parties to the Florida action. Those servants are not necessary parties and did not seek to intervene.

The trustee, Wilmington Trust Company, named in the original *inter vivos* revocable trust set up by the decedent in her lifetime, out of which arose the reserved power of appointment above mentioned. (It is also beneficiary under the will, of the direction to the Executrix to pay the estate taxes on the trust assets).

Personal service of process was had upon all defendants except Delaware Trust Company and Wilmington Trust Company and certain of the individuals concerned with a small part of the \$17,000 above mentioned. As to all of those defendants, constructive service as permitted by the Florida law was had, including mailing to them by the clerk of a copy of the summons and a copy of the complaint. None of those served constructively appeared but those who were served personally did so and participated in the action.²

The complaint set forth that Dora Browning Donner, the decedent, in her lifetime, while a resident of Pennsylvania, had set up an *inter vivos* revocable trust with Wilmington Trust Company, a Delaware banking corporation, as Trustee, in which a large amount of control had been retained by the trustor (R. 17). Sometime in 1944, Mrs. Donner had moved her home and domicile to Florida. On December 3, 1949, while so domiciled in Florida, Mrs. Donner did two things:

- a. She executed her last will and testament, being the will of which appellant now acts as executrix. In this will (R. 12) Mrs. Donner, after making a few personal bequests of small articles, creates the residuary trusts above outlined, and, in describing of what the residue is to consist, includes in it "any and all property, rights and interest over which

2. Although Delaware Trust Company did not appear in the action, one of its directors and a member of its trust committee, Mr. William Foulk, has appeared throughout as counsel for appellant Hanson. (R. 45)

I may have power of appointment which prior to my death has not been effectively exercised by me or has been exercised by me in favor of my executrix." She specifically refers to the *inter vivos* trust (R. 13) and gives directions with respect to estate taxes on those assets.

- b. On the very same day, she exercised a power (R. 31) as reserved in said *inter vivos* trust, directing Wilmington Trust Company to make the distribution outlined above in the beginning of this Statement at the expiration of six months but not later than twelve months after her death. While dated December 3, 1949, the power was not effective until December 21, when it was accepted by the trustee.

There was an even later amendment by Mrs. Donner to the exercise of this last mentioned exercise of the power (R. 35). Neither power was executed with the formality of a will. Under the law of both Delaware and Florida a will must have two witnesses. The will of Mrs. Donner and these two exercises of the power of appointment, all executed while she was domiciled in Florida and all exhibiting a unified testamentary pattern, constituted, according to the Florida Supreme Court, a "republishing of the original trust instrument, or as if the trust instrument had been executed while the settlor was domiciled in Florida". (R. 187) The 1935 trust was in a sense, ambulatory, subject by its terms to *inter vivos* and testamentary modification and revocation; thus the amendments made while the settlor was domiciled in Florida were, in fact, an attempt at a new disposition by her apart from the original indenture. Florida law can determine what disposition may be made by a domiciliary of property over which she has control effective upon her death. It is the law of Florida (*Forsythe v. Spielberger*, 1956, 86 So. 2d 427) that where a will incorporates by reference a previous *inter vivos* trust, which trust is amendable, amendments to the trust effective sub-

sequent to such will must be executed with the formality of a will.

At all times while Mrs. Donner had been a resident of Florida, all of the assets in question, although physically in Delaware, had been returned for intangible taxation in Florida by Mrs. Donner and she had paid the tax thereon (R. 5, 49).

As we will show hereinafter, the reasons we call the trust instrument and the accompanying exercise of powers in reality an agency agreement, are: the trustor's dominance of the trustee by making it subject to the directions of her appointed adviser, and her retention of all incidents of ownership, and her control through powers of revocation, modification, *inter vivos* and testamentary appointments, and the like, and her abortive attempts at testamentary disposition through those *inter vivos* documents.

Appellants, in their Statement of the Case, omit reference to the fact that Hanson, after her motion to dismiss the Florida action was denied by the Circuit and Supreme Court, and after she had then gone to Delaware seeking a different decision in the courts of that state, was enjoined by the Florida courts from proceeding further in Delaware. Her children then, although residents of Florida and parties to the Florida action, through guardians ad litem in Delaware, pressed the suit there. The Florida suit, however, had already been decided in appellees' favor for some time before a decision was handed down in the Delaware action.

POINT I

This Court has no jurisdiction of the appeal.

1. The Appeal Does Not Present Any Substantial Federal Questions.

Questions iv, v and vi, raised by appellants on pages 6-7 of their Brief, are clearly matters of state law, with no federal constitutional significance.

Questions i, ii and iii, stated on page 6 of appellants' Brief, on the surface point up federal constitutional matters. However, cursory examination shows they, too, are without any actual substance.

In essence, as to questions i and ii, Hanson, who is a Florida citizen, the Florida executrix of the Florida will of a Florida decedent, serving by appointment of a Florida court, complains because of alleged federal constitutional infirmities in the service of process upon other co-defendants—the Delaware trust companies—without in any fashion charging any federal constitutional infirmity in the personal service upon her. She is the same person who, dissatisfied with the findings of the Florida court as to what passes under the will of which she is the executrix, sought to thwart that ruling in Delaware only to be enjoined by the Florida court from proceeding further in Delaware. She then caused her children, also Florida residents and parties in the Florida proceedings to progress the Delaware litigation, solely in an effort to defeat the Florida court's proper determination of questions about the very will and estate under which she acts as an officer in the Florida courts.

The Delaware action obviously was not brought in good faith in the light of the facts herein, where fiduciaries combine their activities to impair and defeat the rights of interested persons such as these appellees. The appellant Hanson flagrantly breached her paramount duty to uphold the will and the decrees of the court which appointed her as well as to garner all possible assets for the legatees whom she represents.

It is elemental that the Supreme Court of the United States will not assume jurisdiction of a case where the party invoking that jurisdiction, does so in the interests of a third party. Here appellants, although not attacking the jurisdiction of the Florida courts as to them, say those courts could not validly, under federal constitutional principles, obtain jurisdiction over two of their co-defendants

by constructive service, therefore, they assert a right to come to this court and complain on behalf of others even though their co-defendants are silent and have not appealed.

Their position is untenable. *Liberty Warehouse Co. v. Burley Tobacco Growers' Co-op Marketing Ass'n.*, 1928, 276 U. S. 71; *Smith v. Indiana, Ind.*, 1903, 191 U. S. 138. If the co-defendants—the two Delaware trust companies—conceive their federal constitutional rights are jeopardized, they have a remedy, but the appellants cannot back into this court of limited jurisdiction riding on the alleged rights of others.

Appellants' argument about full faith and credit is equally devoid of merit. Succinctly stated, appellants, with considerable "tongue-in-cheek" candor, argue that the Florida courts, including its court of last resort, having ruled on a matter determining what intangible personal property passes under the will of a Florida decedent, under probate in a Florida court wherein appellant Hanson, a Florida citizen, is the executrix appointed by a Florida court, must recede from such ruling because a *nisi prius* court in Delaware subsequently reaches a contrary conclusion in an action commenced by Hanson long after the Florida trial courts had assumed jurisdiction to determine what passed under the will of her mother. In other words, for example, appellants say, in effect, the Delaware court's view as to what estate assets are subject to the burden of \$400,000 in inheritance taxes, is binding on Hanson as the Florida executrix and is binding on the Florida courts where such will is under domiciliary probate. Surely, this is not good law. Appellants' question iii is frivolous and altogether without substance.³

3. Despite their present insistence that the Florida courts have no jurisdiction to say whether or not the assets in question pass under the will, Hanson, *before appellees' suit was filed in the trial court*, had listed them as assets of the Florida estate and she and her attorneys had petitioned the Florida probate court for fees based upon their inclusion in the assets of the Florida estate and had obtained an order allowing such fees. (R. 69, 74).

The cases appellants cite are entirely inapplicable here because they do not concern proceedings to determine what passes under a will, as did the case before the lower court here, but are rather direct attacks on validity of trusts or exercises of powers of appointment, having a fixed, rather than a roving situs as herein. Also, they deal primarily with problems of *in personam* rather than declaratory relief.

2. The Federal Questions Sought to Be Reviewed Were Not Timely or Properly Raised or Expressly Passed On.

While it is true the appellant, in her petition for rehearing filed in the Supreme Court of Florida, raised substantially the same matters as presented in her questions i, ii and iii, pages 7 and 8 of her Jurisdictional Statement herein, such questions were not passed upon by the Supreme Court of Florida since the petition for rehearing was denied without comment (R. 204, 233). **In addition, the law is well settled that raising such federal constitutional grounds for the first time in a petition for rehearing in the state court of last resort comes too late.** *Spies v. Illinois*, Ill. 1887, 123 U. S. 131; also, *Bolln v. Nebraska*, Neb. 1900, 176 U. S. 83; *Herndon v. Georgia*, Ga. 1935, 295 U. S. 441; reh. den. 296 U. S. 661.

3. The Judgment From Which the Appeal Is Taken Does Not Rest On an Adequate Federal Basis.

The controversy below is a routine inquiry into what passed under the Florida will of a Florida decedent wherein another Florida citizen, appellant herein, was the executrix duly appointed by a Florida court. Such actions, usually in the form of declaratory decree proceedings, as here, are common in all states, and are useful vehicles for the orderly administration of estates. The judgment below resulted in nothing more than a judicial declaration of what property passed under the will of the decedent. There was no money judgment against any party. It left open,

to be later followed up if desired by any party, any necessary proceedings to implement the decision. Conceivably such later proceedings might mean additional litigation in Florida, or elsewhere; to give effect to the declaration of rights, but they are not now before this court or the courts below. It is not the function or intent of the Supreme Court of the United States to take part in disputes as to the correct application of Florida law by Florida courts. *U. S. v. Hastings*, 1935, 296 U. S. 188; *Nickel v. Cole*, Nev., 1921, 256 U. S. 222; *Minneapolis, etc., R. Co. v. Washburn Lignite Coal Co.*, 1920, 254 U. S. 370.

POINT II

♦ **The Florida courts below had complete jurisdiction of the subject matter and of all necessary parties.**

Surely we must accept as a basic proposition, that each State of the Union has exclusive power to determine what property is to pass under the wills of its own domiciliaries. *Demorest v. City Bank Farmers T. Co.*, 321 U. S. 36, 48.

The law of Florida properly was applied below, rather than the law of Delaware. Its domiciliary's attempts to effect the disposition of the greater part of her estate through contractual manipulation, and her other acts, gave Florida a substantial basis upon which to apply its own Law. *Rubin v. Irving Trust Co.*, 305 N. Y. 288.

The law of Florida, Chapter 87, F. S., (Appendix, Post) specifically allows actions for declaratory decrees in a case such as this. If such a means were not permitted by the law of Florida, real and substantial questions affecting the administration of this Florida estate could never be solved, viz:

- a. Do the assets in question have to bear a portion of the Florida and of the federal estate tax burden?

- If so, in what proportion and how is it to be allocated? Is the estimated tax of \$400,000 to be a burden solely on appellees' share of the estate, or is it to be allocated proportionately upon both appellees' and the trust beneficiaries' portion?
- b. Are the assets in question such a part of the estate that they can be looked to by Florida creditors of the estate for satisfaction of their claims?
 - c. In awarding administrative fees and allowances in Florida, are such assets to be considered as a part of the estate, or should such allowances be computed solely on the balance of the estate?

Let us not forget that the executrix, Hanson, herself listed these trust-agency assets as part of the Florida estate and procured Florida awards of fees based thereon (R. 69-70). Furthermore, as such executrix she seeks the payment of all estate taxes upon the trust assets out of the Florida estate, pursuant to that direction under the Will (R. 13). The appellant, Hanson, herself inventoried the trust agency assets as part of the Florida general estate. She did no more after death than did the testatrix during her lifetime who paid Florida intangible personal property taxes upon the trust assets, thus recognizing that she and not the Delaware trustee, was the true owner of those assets. (R. 5, 49)

Appellants were given reasonable notice and opportunity to be heard on these trust matters "which had a substantial connection" with the State of Florida. *McGee v. International Life Ins. Co.*—U.S.—, dec'd 12/16/57; No. 50, Oct. Term, 1957.

Appellant argues that the conclusions of the Supreme Court of Delaware overruled those of Florida in these practical administration problems of a Florida estate of a Florida decedent under probate in a Florida court, of which appellant Hanson, also a Florida citizen, is the

personal representative. It would indeed be a novel result if the Delaware courts could validly, for instance, tell the Florida courts what were the estate tax implications or the extent thereof of an estate of a Florida decedent under probate in a Florida court.

At this juncture of the Florida litigation, there is no attempt to enforce the Florida decision outside the State of Florida, although we believe this Court ought to find it enforceable in Delaware. The decision stands, at this point, as a declaration of rights under the law of Florida, the correctness of which, we respectfully submit, is not for the Supreme Court of the United States to debate. To the extent the Florida decision determines the status of appellant (a citizen of Florida and a fiduciary of one of its courts) towards the two Delaware trust companies, it is binding within the State of Florida, regardless of the type or manner of service of process on the non-resident trust companies. Even the "Strict Doctrine" of *Pennoyer v. Neff*, 95 U. S. 714, is qualified by the following quotation from Justice Field's famous opinion therein:

"To prevent any misapplication of the views expressed in this opinion, it is proper to observe that we do not mean to assert, by anything we have said, that a state may not authorize proceedings to determine the status of one of its citizens toward a non-resident, which would be binding within the state, though made without service of process or personal notice to the non-resident. The jurisdiction which every state possesses, to determine the civil status and capacities of all of its inhabitants involves authority to prescribe the conditions on which proceedings affecting them may be commenced and carried on within its territory."

Appellants were given "Fair Play and Substantial Justice". It would be destructive of the sovereignty of the State of Florida to hold that it may not regulate the wills, deeds and estates of its domiciliaries.

Appellants argue that the Florida courts, having decided what passes under the will of a Florida decedent must now reverse themselves under the doctrine of full faith and credit simply because a later decision in Delaware, reaches a contrary result. Appellants' argument on this score is absurd when we consider the fact that all necessary parties in interest were before the Florida court, including herself as the personal representative of the settlor-testatrix, the residuary legatees, and those who would take as beneficiaries under the residuary legatees, as well as those who would take if the powers of appointment were properly exercised. Her argument that the two Delaware trust companies were not properly before the Florida court implies, since each was a legatee or subject to the operation of directions in the decedent's will, that the Florida court cannot, except by personal service of process within the state make a binding determination as between legatees of the will of a Florida domiciliary, under probate in a Florida court, of what personal property passes under such will.⁴ If the two Delaware trust companies were properly before the Florida courts as legatees, without personal service of process, they were before that court in any other capacity they might bear to the parties. Beyond that, and even if this were not true, they were before the Florida court under the doctrine of virtual representation since in privity with those personally appearing in that proceeding.

4. We contend, under the principle of *Mullane v. Central Hanover Bank & Trust Co.*, 339 U. S. 306, 313, the right of the Florida courts to determine what personal property passes under the will of a Florida decedent is "so insistent and rooted in custom as to establish beyond doubt the rights of the courts to determine the interests of all claimants, resident or non-resident, provided the procedure accords full opportunity to appear and be heard"; we contend further, that here, since copies of the summons and of the complaint were in fact mailed to the non-resident banks, "traditional notions of fair play and substantial justice" are served and the due process clause is observed. *International Shoe Co. v. Washington*, 326 U. S. 310.

POINT III

The decree of the Florida Supreme Court is correct in all respects and should be given full faith and credit.

The opinion herein of the Supreme Court of Florida presents a sound and compelling disquisition on the subject (R. 182-192).

Thus, the full faith and credit clause of the federal Constitution should be applied in this case to protect the decrees and decisions of the Florida courts in determining what passes under the will of said deceased. The chancery case in Delaware was filed approximately six months after the chancery case had been filed in Florida, and the decision of the Supreme Court of Florida was rendered several weeks before the decision of the Supreme Court of Delaware.

As hereinbefore shown in this brief, the Delaware action could not possibly have been brought in good faith, but was an unconscionable attempt on the part of the appellants to oust the Florida courts of the power to administer the estate of a Florida citizen and determine what passed under her will.

In the instant case neither the so called trust-agency instrument nor the power of appointment provides for the vesting of a *present interest* in anyone except to retain dominant proprietary rights in Dora Browning Donner, the donor of the so called trust. Therefore, the entire proprietary or reversionary interest in the trust property remains in her estate to be administered under the terms of her will.

The trustor, Mrs. Donner, reserved such control over the trustee and the trust as to make the trustee her mere agent. 1 Bogert, Trusts and Trustees, Sec. 104, p. 490.

Under the laws of Florida an instrument that does not pass an interest until the death of the maker is testamentary, and for it to be valid as a will it must be attested by at least two witnesses, and it must be probated. The trust herein even is testamentary according to the Laws of Pennsylvania where the trustor then was domiciled when it was made. *Pengelly's Estate*, 97A 2d 844, 374 Pa. 358.

"A deed, in order to be effective as such, must pass a *present interest* to the grantee, although grantee's right to enter into possession may be deferred to a future time, and if deed manifests an intention that it shall be operative only upon the grantor's death, it can never take effect at all unless executed with such formality that it may be given effect as a testamentary disposition."

Williams v. Williams, 149 Fla. 454, 6 So. 2d 275 (3);
Leonard v. Campbell, 138 Fla. 405, 189 So. 839 (4).

This rule is stated by the Supreme Court of Mississippi as follows:

"When instrument in form of deed specifically provides that it shall not take effect until the death of grantor, it is testamentary in character and void as a deed."

"Even though instrument may be in form of a deed, if no *present interest* is thereby conveyed and it states or clearly shows that it does not take effect so as to pass an interest until grantor's death, it is testamentary in character and invalid as a deed."

Rodgers v. Rodgers (Miss.), 67 So. 2d 698 (2, 4).

To the same effect see the cases of

Harber v. Harber, 152 Ga. 78, 108 S. E. 520;
Argile v. Fulton, 295 Ill. 569, 129 N. E. 526.

In *Page on Wills*, Lifetime Edition, volume 1, section 61, it is stated that whether an instrument passes an interest during testator's lifetime or only on his death depends on his intention. In this case Mrs. Donner's intention was clearly expressed in the power of appointment, and she specifically provided that no interest is to pass *until her death*.

In section 74 of *Page on Wills, supra*, it is stated that an instrument which passes a *present interest* is a deed and not a will, and in section 75 it is stated that whenever an instrument shows on its face that the maker does not intend that any interest shall pass thereby *until his death, it is a will*.

It was the clear intent of the donor, as found in the trust agency agreement of March 25, 1935, and her attempted appointments thereunder, and her Last Will and Testament of December 3, 1949, that the so-called trust instrument should be ambulatory as to the devolution of the property thereunder and governed by the laws of her domicile, at least at the time of her death. This is apart from the donor's dominance of the trustee by making it subject to an adviser appointed by her and other controls (R. 20-21).

There is a remarkable similarity between paragraph "Seventh" of the will, making the executrix and trustee thereunder subject to the domination of another as "adviser" (R. 15) and paragraph "4" of the trust instrument to the same effect (R. 20). A web of *inter vivos* and *post mortem* controls thus was confirmed.

The devolutionary provision appearing at par. "1" of the trust instrument reads, in part, that upon the donor's death, the principal shall be paid as appointed by her "last instrument in writing"; or failing that, by her "last will and testament" (R. 18). This is not the language of a present deed of interest. It is the language

of one who withholds to the end, as in a will, what shall be done with her property.

Both the trust instrument and the will interchangeably incorporate each other by reference.

Par. "FIFTH" of the Will, which contains the residuary dispositions, includes, in its introductory portion, all property over which the testatrix might have a power of appointment not effectively exercised by her prior to death, and directs the testamentary payment of all estate taxes on the specific trust property in question (R. 13).

Thus, the donor-testatrix focused all her dispositions in her will and made Florida her domiciliary State, the final arbiter of what was effectively otherwise disposed of or passed under her will. This was so that not only might the estate taxes be paid by her Executrix in either event, but also so that full devolution of all her property might take place according to her written directions. We therefore find in the will the express language which passes into the hands of the Florida court the power to determine what passes under the will, and in the agency trust agreement the reservation in her of the power to dispose by her will or other last written instrument of the property subject to that agreement.

It is very important to observe that the "last instrument in writing" executed by the donor and required by the express terms of the agency trust agreement for an effective appointment of the subject property, is the so-called second power of appointment, an instrument dated July 7, 1950 (R. 35-36). This last instrument in writing of July 7, 1950, contains no exercise of any power of appointment but merely cancels in part a previous purported appointment.

It is fundamental that instruments attempting to exercise a power must strictly conform to the grant of power.

3 Bogert, "The Law of Trusts and Trustees", Part 1, Sec. 532, Note 41, page 333. Therefore, *there having been no appointment of the inter vivos property by the last instrument in writing, the alternative provisions of the agency trust agreement come into effect and the property devolves under the testatrix's Last Will and Testament.*

Full Faith and Credit

It would seem that this topic has been exhausted elsewhere. The requirements of substantial justice are that a matter once having been litigated between parties ought to be laid to rest forever. The full faith and credit clause of the federal Constitution "... brings to our Union a useful means for ending litigation." *Riley v. New York Trust Co.*, 315 U. S. 343.

Appellants had their day in court or an opportunity for a full day in court in Florida, with all reasonable safeguards provided as to their rights and interests. It was most unfair and unjust that they should have been permitted the employment of the judicial implements of Delaware in order to attempt to set at naught that which Florida already had decreed as to them.

This court should sustain the dignity of the decree of the Florida Supreme Court appealed from.

CONCLUSION

The appeal should be dismissed, or, in the alternative, the judgment of the Supreme Court of Florida, dated September 19, 1956, should be affirmed.

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• APPENDIX

Florida Statutes, Chap. 87:

“87.01 *Scope; jurisdiction of circuit court.*—The circuit courts of the state are hereby invested with authority and original jurisdiction and shall have the power upon a filed complaint, to declare rights, status and other equitable or legal relations whether or not further relief is or could be claimed or prayed. No action or procedure shall be open to objection on the ground that a declaratory decree, judgment or order is prayed for. The circuit court's declaration may be either affirmative or negative in form and effect and such circuit court declaration shall have the force and effect of a final decree, judgment or order. The circuit courts may render declaratory decrees, judgments or orders as to the existence, or non-existence:

- (1) Of any immunity, power, privilege or right; or
- (2) Of any fact upon which the existence or non-existence of such immunity, power, privilege or right does or may depend, whether such immunity, power, privilege or right now exists or will arise in the future. Any person seeking a declaratory decree, judgment or order may, in addition to praying for a circuit court declaration, also pray for additional, alternative, coercive, subsequent or supplemental relief in the same action.

“87.02 *Power to construe, etc.*—Any person claiming to be interested or who may be in doubt as to his rights under a deed, will, contract or other article, memorandum or instrument in writing or whose rights, status or other equitable or legal relations are affected by a statute, or any regulation made under statutory authority, or by municipal ordinance, contract, deed, will, franchise, or other article, memorandum or instrument in writing may

have determined any question of construction or validity arising under such statute, regulation, municipal ordinance, contract, deed, will, franchise, or other article, memorandum or instrument in writing, or any part thereof, and obtain a declaration of rights, status or other equitable or legal relations thereunder.

“87.04 *Suits by executors, administrators, trustees; etc.*—Any person interested as or through an executor, administrator, trustee, guardian, or other fiduciary, creditor, devisee, legatee, heir, next of kin, or cestui que trust, in the administration of a trust, or of the estate of a decedent, an infant, lunatic, or insolvent, may have a declaration of rights or equitable or legal relations in respect thereto:

(1) To ascertain any class of creditors, devisees, legatees, heirs, next of kin, or others; or

(2) To direct the executor, administrator, or trustee to abstain from doing any particular act in his fiduciary capacity; or

(3) To determine any question arising, in the administration of the estate or trust, including questions of construction of wills and other writings.

“87.05 *Enumeration not exclusive.*—The enumeration in §§ 87.02, 87.03 and 87.04 does not limit or restrict the exercise of the general powers conferred in §87.01, in any proceeding where declaratory relief is sought; also, any declaratory decree, judgment or order given or made in pursuance of this chapter may be given or made by way of anticipation with respect to any act not yet done or any event which has not yet happened, and in such case the said decree, judgment or order shall have the same binding effect with respect to that future act or event, and the rights or liability to arise therefrom, as if that act or event had already been done or had already

happened before the said decree, judgment or order was given or made.

“87.07 *Supplemental relief*.—Further relief based on a declaratory decree, judgment or order may be granted whenever necessary or proper. The application therefor shall be by petition to the circuit court having jurisdiction to grant the relief. If the application be deemed sufficient, the circuit court shall, on reasonable notice, require any adverse party whose rights have been adjudicated by the declaratory decree, judgment or order, to show cause why further relief should not be granted forthwith.

“87.10 *Parties*.—When declaratory relief is sought, all persons may be made parties who have or claim any interest which would be affected by the declaration, and no declaration shall prejudice the rights of persons not parties to the proceedings. In any proceeding which involves the validity of a municipal ordinance or franchise, such municipality shall be made a party, and shall be entitled to be heard, and if the statute, ordinance or franchise is alleged to be unconstitutional, the attorney general of the state or the state attorney of the judicial circuit in which the action is pending shall also be served with a copy of the proceedings and be entitled to be heard.

“87.12 *Adequate remedy does not preclude*.—The existence of another adequate remedy shall not preclude a decree, judgment or order for declaratory relief. The circuit court may order a speedy hearing of an action for a declaratory decree, judgment or order and may advance it on the calendar. When a suit for declaratory decree is filed as provided in this chapter the court shall have power to give as full and complete equitable relief as it would have had if such proceeding had been instituted as a suit in equity.”

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1957

No. 107

ELIZABETH DONNER HANSON, Individually, as Executrix of the Will of Dora Browning Donner, Deceased, and as Guardian ad Litem for JOSEPH DONNER WINSOR and DONNER HANSON, and WILLIAM DONNER ROOSEVELT, Individually,

Appellants,

vs.

KATHERINE N. R. DENCKLA, Individually, and ELWYN L. MIDDLETON, as Guardian of the Property of DOROTHY BROWNING STEWART, Also Known As DOROTHY B. STEWART and DOROTHY B. RODGERS STEWART, an Incompetent Person,

Appellees.

PETITION FOR REHEARING

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Appellees.

PETITION FOR REHEARING

The appellees respectfully submit that they have been aggrieved by the judgment or decision of this Court rendered on June 23, 1958, and petition for a rehearing of said matter.

The grounds of this petition are as follows:

1. This Court completely disregards the fact that the decision of the Circuit Court of Florida held that the trustees are not indispensable parties (R. 110, 112, 120). Since that determination was left undisturbed by the Supreme Court of Florida, (R. 192) which held it was not necessary to review that holding,—ergo, it is the Law of this Case.

This Court ought not to dictate the internal law of the sovereign State of Florida when that determination in this case has already been made oppositely by a Florida court with jurisdiction to do so.

2. This Court also ignored the fact that the Wilmington Trust Company, the trustee of the indenture in question, concededly had parted with all legal title to the trust assets by payment out prior to the commencement of the litigation (R. 61-62, 105-106) and therefore was not a real or necessary party in interest. In addition, the Delaware Trust Company as appointee under the exercise of the power, already was before the Florida Court as a trustee-legatee under the residuary provisions of the Will, and as a beneficiary-legatee under the testamentary direction for payment by the executrix of the estate taxes upon the property so appointed to the Delaware Trust Company.

This Court also has overlooked the fact that the residuary legatees will *not* receive the sum of \$500,000. each, as expressed in the majority opinion of this Court, but will actually receive, in trust, a sum substantially depleted by the direction for the payment of those estate taxes out of the testamentary estate upon the \$1,400,000. disposed of by the inter vivos appointment.

3. This Court has deliberately violated and destroyed the right of Florida to deal with its domiciliaries and legatees properly before the Court below and unquestionably subject to its jurisdiction. The executrix was before the Florida Court as a Florida domiciliary and appointee in a true adversary proceeding attempting to protect certain personal interests of her own and of her minor children adverse to her paramount fiduciary responsibility as executrix. These appellees have not received from this Court or from their fiduciary, the Florida executrix, the impartial protection of the law due them. This Court disregards the fact that it was and is correct and lawful for the Florida Court to hold this executrix and the other parties personally served to a binding judgment and to call the parties before it to account for their actions.

4. Neither this Court nor the Delaware Court has any right to interfere with the Florida determination of the invalidity of the exercise of a power of appointment or of any other paper writing necessarily involved in probate proceedings in so far as the Florida Court has determined what its own law is with respect thereto and affecting only its own citizens.

The effect of this Court's decision is to do more than deny Florida the right to bind the Delaware trustees. For example, it has deprived Florida of the right to direct that its own executrix shall not pay the substantial inheritance taxes provided to be paid under paragraph "Fifth" of the Will, (R. 13) upon the \$400,000. which is payable to others through the purported exercise of the power of appointment under the trust agreement.

In expressly appointing the balance of the inter vivos trust property to her estate, (R. 34) the testatrix merged that property with her testamentary estate for the purposes of distribution under her Will. We assume that the Court will agree this far, that if the testatrix had held title to the securities in her own name in Delaware, they would have been just as much a part of her estate and subject to her Will the same as the other property owned by her and physically located in Florida.

This Court, therefore, ought not to invade the sovereign precincts of Florida and deny to it the right to say that no inheritance taxes or other payments shall be made out of the Florida estate. This Court has acted to the detriment of the Florida legatees and for the benefit of Delaware trustees.

In *Riggs v. del Drago*, 317 U.S. 95, 97-98, 87 L. ed. 106, 110-111, this Court stated: "We are of opinion that Congress intended that the federal estate tax should be paid out of the estate as a whole and that the applicable state law as to the devolution of property at death should govern the distribution of the remainder and the ultimate impact of the federal tax; . . ."

This Court repeatedly has held that the power to regulate transmission of property by will is exclusively for the states. *United States v. Fox*, 94 U.S. 315, 24 L. ed. 192; *United States v. Perkins*, 163 U.S. 625, 41 L. ed. 287; *Irving Trust Co. v. Day*, 314 U.S. 556, 86 L. ed. 452.

3. It is the testatrix herself, as grantor of the trust, who made the trustees such in name only. That they were actually reduced by her to mere administrative and disbursing agents has been covered before and need not be repeated herein. Equally important, we believe, is the manner in which she interwove and blended the dispositions through her testamentary and inter vivos instruments.

Paragraph "Fifth" of the Will expressly makes the Delaware trust indenture a matter of substantial Florida concern in that said indenture is incorporated therein by reference through the following:

(a) The express direction for payment of inheritance taxes on the Delaware property out of the Florida estate gives the inter vivos trustees a direct contact with the Will for it makes them beneficiary-legatees of that direction for tax payment on property in their hands.

(b) The express inclusion in the Florida residuary estate of all property over which the testatrix might have a power of appointment which was not effectively exercised by her, imposes upon the Florida executrix the burden and duty of collecting assets not otherwise effectively disposed of and subjects the Delaware property and manner of its appointment to the scrutiny and test of the Florida courts.

(c) The Will purports to dispose of the property appointed to the executrix, as such, according to the express exercise of the power of appointment under the trust indenture by the first power instrument dated December 3, 1949, par. 2(b). (R. 34) The exercise of the power must be read with, not separate from, the Will in order to determine its validity. 1 Scott on Trusts, 2 ed., pp. 373-377. To fail

to relate those instruments to each other would carry the matter, as the late Judge Cardozo observed in *Matter of Rausch*; 258 N.Y. 327, 179 N.E. 755, to "a drily logical extreme."

As was held in the recent case of *Matter of Deane* 4 N.Y. (2nd) 326 at p. 331 it is the general rule in this country that the law of the domicile of the donor of the power controls the disposition upon the theory that she is the owner of the property.

The complete power reserved by the testatrix to dispose of the fund as she saw fit not only gave her a "beneficial interest," (cf. *Whitney v. State Tax Commission*, 309 U.S. 530, 538, 84 L. ed. 909, 913; Op., Frankfurter, J.) but was equivalent to an absolute ownership by her of the fund. *Helvering v. Clifford*, 309 U.S. 331, 84 L. ed. 788; Op., Douglas, J.; *Manion v. Peoples Bank of Johnstown*, 292 N.Y. 317, 55 N.E. 2d 46. In essence, the settlor was the sole beneficiary. *Weymouth v. Delaware Trust Co.*, 29 Del. Ch. 1, 45 A.(2d) 427; *Adams v. Adams*, 147 Fla. 267, 2 So. (2d) 855.

This Court did violence to the rigidly entrenched paramount right of the State to determine how and in what manner the wills of its domiciliaries shall operate upon property to which they are related. *Frederickson v. The State of Louisiana*, 64 U.S. 445, 23 How. 445, 16 L. ed. 577.

In all justice to the appellees whose rights are destroyed the least this Court ought to do is to define how far it intends its decision to go in dictating the *internal administration* of the Florida estate! How far does this Court's usurpation of *declaring Florida State law* go?

6. *This Court lost complete jurisdiction to reverse the Florida judgment upon granting the motion to dismiss the Florida appeal for lack of jurisdiction.* Its only lawful course was to retain jurisdiction of the appeal and treat it as a petition for a writ of certiorari.

Title 28 U.S.C.A. Sec. 2103, expressly provides that if the appeal to this Court is improvidently taken, "*. . . this alone shall not be ground for dismissal;*" but the papers on appeal shall be regarded as a petition for a writ of certiorari. It is thus clear, as stated, that this Court should not have dismissed the Florida appeal, and having done so it lost jurisdiction herein and did not have the statutory power to treat the papers as a petition for a writ. Accordingly, its order reversing the Florida judgment is void and should be vacated.

WHEREFORE, and for other reasons appearing in appellees' briefs previously filed on the appeal, they respectfully petition that a rehearing be granted and that issuance of the mandate of this Court be stayed pending disposition of this petition.

Respectfully submitted,

SOL A. ROSENBLATT

Counsel for Petitioners (Appellees)

July 1, 1958

Certificate of Counsel

I, SOL A. ROSENBLATT, of 630 Fifth Avenue, New York, New York, an attorney duly admitted to practice in this Court, do hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay.

Dated, July 1, 1958.

SOL A. ROSENBLATT

Counsel for Petitioners (Appellees)

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FILED

MAY 7 1957

JOHN J. FEY, Clerk

IN THE

Supreme Court of the United States

October Term, 1956

No. ~~117~~ 117

**DORA STEWART LEWIS, MARY WASHINGTON STEWART
BORIE and PAULA BROWNING DENCKLA,**

Petitioners,

**ELIZABETH DONNER HANSON, as Executrix and Trustee under
the Last Will of Dora Browning Donner, Deceased,**

**WILMINGTON TRUST COMPANY, a Delaware Corporation, as
Trustee Under Three Separate Agreements, (1) and (2) with William
H. Donner dated March 18, 1932 and March 19, 1932, and (3) with
Dora Browning Donner Dated March 25, 1935,**

**DELAWARE TRUST COMPANY, a Delaware Corporation, as Trustee
Under Three Separate Agreements (1) with William H. Donner Dated
August 6, 1940, and (2) and (3) with Elizabeth Donner Hanson, Both
Dated November 26, 1948,**

KATHERINE N. R. DENCKLA,

**ROBERT B. WALLS, ESQUIRE, Guardian Ad Litem for Dorothy
B. R. Stewart and William Donner Denckla,**

**ELWYN L. MIDDLETON, Guardian of the Property of Dorothy B. R.
Stewart, a Mentally Ill Person,**

**EDWIN D. STEEL, JR., ESQUIRE, Guardian Ad Litem for Joseph
Donner Winsor, Curtin Winsor, Jr., and Donner Hanson,**

**BRYN MAWR HOSPITAL, a Pennsylvania Corporation, MIRIAM V.
MOYER, JAMES SMITH, WALTER HAMILTON, DOROTHY
A. DOYLE, RUTH BRENNER and MARY GLACKENS,**

**LOUISVILLE TRUST COMPANY, a Kentucky Corporation, as Trus-
tee for Benedict H. Hanson, and as Trustee Under Agreements with
William H. Donner,**

**WILLIAM DONNER ROOSEVELT, JOHN STEWART and BENE-
DICT H. HANSON,**

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF DELAWARE.

ARTHUR G. LOGAN,

LOGAN, MARVEL, BOGGS and THEISEN,
Continental American Building,
Wilmington 1, Delaware,

*Attorneys for Dora Stewart Lewis,
Mary Washington Stewart Borie
and Paula Browning Denckla,
Petitioners.*

INDEX TO PETITION.

	Page
CITATIONS TO OPINIONS BELOW	2
JURISDICTION	2
QUESTIONS PRESENTED	3
SUMMARY OF THE PROCEEDINGS	3
HOW THE FEDERAL QUESTION AROSE	5
CONSTITUTIONAL PROVISION INVOLVED	5
STATEMENT OF THE CASE	5
REASONS FOR GRANTING THE WRIT	9
CONCLUSION	11

TABLE OF CASES CITED.

	Page
Adam v. Taenger, 303 U. S. 59	9
Baker v. Baker, Eccles, & Co., 242 U. S. 394	10
Fauntleroy v. Lum, 210 U. S. 230	10
Milliken v. Meyer, 311 U. S. 457	9, 10
Riley v. New York Trust Co., 315 U. S. 343	9, 10
Roche v. McDonald, 275 U. S. 449	9

STATUTES AND OTHER AUTHORITIES CITED.

	Page
Constitution of the United States; Article IV, § 1	5
28 U. S. C. § 1257(3)	2

TABLE OF CONTENTS OF APPENDIX.

	Page
Opinion of the Court of Chancery of the State of Delaware in and for New Castle County	1a
Order of the Court of Chancery of the State of Delaware in and for New Castle County	19a
Opinion of the Supreme Court of Florida	20a
Order of the Supreme Court of Florida	33a
Opinion of the Supreme Court of the State of Delaware	35a
Order of the Supreme Court of the State of Delaware	60a

IN THE
Supreme Court of the United States.

OCTOBER TERM, 1956.

No.

DORA STEWART LEWIS, MARY WASHINGTON STEWART BORIE
and PAULA BROWNING DENCKLA,

Petitioners,

v.

ELIZABETH DONNER HANSON, as Executrix and Trustee
Under the Last Will of Dora Browning Donner, De-
ceased,

WILMINGTON TRUST COMPANY, a Delaware Corporation, as
Trustee Under Three Separate Agreements, (1) and
(2) With William H. Donner Dated March 18, 1932 and
March 19, 1932, and (3) With Dora Browning Donner
Dated March 25, 1935,

DELAWARE TRUST COMPANY, a Delaware Corporation, as
Trustee Under Three Separate Agreements (1) With
William H. Donner Dated August 6, 1940, and (2) and
(3) With Elizabeth Donner Hanson, Both Dated No-
vember 26, 1948,

KATHERINE N. R. DENCKLA,

ROBERT B. WALLS, ESQUIRE, Guardian ad Litem for Dorothy
B. R. Stewart and William Donner Denckla,

ELWYN L. MIDDLETON, Guardian of the Property of Dorothy
B. R. Stewart, a Mentally Ill Person,

EDWIN D. STEEL, JR., ESQUIRE, Cuardian ad Litem for
Joseph Donner Winsor, Curtin Winsor, Jr., and Don-
ner Hanson,

BRYN MAWR HOSPITAL, a Pennsylvania Corporation, MIRIAM
V. MOYER, JAMES SMITH, WALTER HAMILTON, DOROTHY
A. DOYLE, RUTH BRENNER and MARY GLACKENS,

LOUISVILLE TRUST COMPANY, a Kentucky Corporation, as
Trustee for Benedict H. Hanson, and as Trustee Under
Agreements With William H. Donner,

WILLIAM DONNER ROOSEVELT, JOHN STEWART and
BENEDICT H. HANSON,

Respondents.

**PETITION FOR WRIT OF CERTIORARI TO THE
SUPREME COURT OF THE STATE OF DELA-
WARE.**

Petitioners, Dora Stewart Lewis, Mary Washington Stewart Borie and Paula Browning Denekla, pray that a writ of certiorari issue to review the judgment of the Supreme Court of the State of Delaware in Appeal No. 8, 1956, entered therein on January 14, 1957, rehearing denied February 7, 1957.

CITATIONS TO OPINIONS BELOW.

The opinion of the Court of Chancery of the State of Delaware is reported in 119 A. 2d 901 (R. 173),¹ and is printed in the Appendix attached hereto (A. 1a).² The opinion of the Supreme Court of the State of Delaware, printed in Appendix (A. 34a), is reported in 128 A. 2d 819. The opinion of the Supreme Court of the State of Florida, printed in the Appendix hereto (A. 20a) is unreported.

JURISDICTION.

The mandate of the Supreme Court of the State of Delaware was stayed by virtue of its order dated February 7, 1957, to permit petitioners to apply for a writ of certiorari (A. 60a, 61a). Re-hearing was denied on the same date (A. 60a, 61a). Jurisdiction of this Court is invoked under 28 U. S. C. § 1257(3).

1. (R. —) refers to the printed Appendices used in the Supreme Court of the State of Delaware.

2. (A. —) refers to petitioners' Appendix.

QUESTIONS PRESENTED.

1. Does the Full Faith and Credit Clause compel the Courts of the State of Delaware to recognize and give full force and effect to the judgment of the Supreme Court of the State of Florida?

2. Has the Supreme Court of the State of Delaware failed to give full faith and credit to the judgment of the Supreme Court of the State of Florida?

3. Did the Supreme Court of the State of Delaware err in holding the trust agreement valid and enforceable?

SUMMARY OF THE PROCEEDINGS.

This action was brought by Elizabeth Donner Hanson as Executrix and Trustee under the Last Will and Testament of Dora Browning Donner, deceased, for a declaratory judgment in the Court of Chancery of the State of Delaware in and for New Castle County to determine the persons entitled to participate in certain assets held by Wilmington Trust Company, as trustee under a trust agreement between it and the said Dora Browning Donner, executed March 25, 1935, and under certain powers of appointment purportedly exercised pursuant to such trust agreement. All parties in interest were named as defendants in that action (R. 3).

Prior to the institution of the action below a declaratory judgment action was commenced in the Circuit Court of the Fifteenth Judicial Circuit of Florida, Palm Beach County, by Katherine N. R. Denckla, et al., against the Wilmington Trust Company, Trustee, et al., to determine what assets passed under the Will of the said Dora Browning Donner, who had died a resident of and domiciled in the State of Florida (R. 70). As a necessary incident in deter-

mining what passed under the will of Dora Browning Donner, the Florida Court was obliged to determine whether the trust agreement and the powers of appointment were valid and had been validly exercised. On January 14, 1955, the Circuit Court of the Fifteenth Judicial Circuit of Florida, Palm Beach County, held by summary final decree that the trust executed March 25, 1935, was invalid because no present interest passed to any beneficiary other than the trustor (testatrix) and further, that the purported exercises of the power of appointment were testamentary and, therefore, invalid because the powers were not properly attested as required by the laws of the State of Florida. The Circuit Court held further that it had no jurisdiction over the non-answering defendants (R. 83-84). On appeal and cross appeal to the Supreme Court of the State of Florida, the decree of the Circuit Court was affirmed as to the invalidity of the trust and the powers of appointment executed thereunder and reversed as to the jurisdiction of the Circuit Court over the non-answering defendants (A. 20a).

In the interim, on January 13, 1956, the Court of Chancery of the State of Delaware in and for New Castle County entered an order upholding the validity of the March 25, 1935, trust and held further that that Court was not bound by the Summary Final Decree in the Florida action and that the distributions made by the trustee were validly made (R. 191). On appeal to the Supreme Court of the State of Delaware, the action of the Delaware Court of Chancery was affirmed, the Delaware Supreme Court holding that it was in no way bound by the decree of the Circuit Court of the State of Florida or the judgment of the Supreme Court of the State of Florida and that the trust and powers of appointment executed in conformity therewith were valid (A. 59a). The Supreme Court of the State of Delaware further noted that this litigation in the Supreme Courts of Delaware and Florida have "become a headlong jurisdictional collision between states" (A. 40a).

HOW THE FEDERAL QUESTION AROSE.

The Full Faith and Credit Clause was urged as being binding by the petitioners in their Delaware answer to the complaint for declaratory judgment and in the counter-claims and cross-claims filed therewith (R. 63). It was again urged upon the Delaware Court of Chancery in petitioners' Motion For New Trial filed on January 20, 1956 (R. 199). It was also the subject of the opinion of the Supreme Court of the State of Delaware (A. 34a). It was specifically rejected by both Courts (A. 11a, 12a, 59a).

CONSTITUTIONAL PROVISION INVOLVED.

The petition involves the meaning and effect of Article IV, Section 1, United States Constitution (the Full Faith and Credit Clause).

STATEMENT OF THE CASE.

Dora Browning Donner died on November 20, 1952, a citizen, resident of, and domiciled in the State of Florida, leaving a Last Will and Testament dated December 3, 1949 (R. 3). The Will named respondent, Elizabeth Donner Hanson, as Executrix and, after disposing of personal effects, divided her residuary estate into two parts (1) to Delaware Trust Company, trustee under a trust for the benefit of Katherine N. R. Denekla Ordway and (2) to Elizabeth Donner Hanson, trustee for the benefit of Dorothy B. Rodgers Stewart (R. 15). The Will was duly admitted to probate and the executrix qualified in Palm Beach County, Florida, on December 23, 1952 (R. 3).

Prior to the execution of the Will, Mrs. Donner had entered into a purported agreement of trust dated March 25, 1935, with Wilmington Trust Company as trustee (R.

21-29). The trust agreement provided that the trustee could act only with the written consent of the advisee of the trust and the trustor retained the right to nominate any additional advisers or change advisers during her lifetime. The trustor also retained other broad powers including the power to remove the trustee. The net result of the cumulative retained powers and the manner whereby the trust was administered was to create the relationship of principal and agent between the named so-called trustee and the so-called trustor (R. 127-156). The trustee was to pay the net income to the trustor during her lifetime and, upon the death of the trustor, to assign and deliver the trust fund unto such persons and in such manner and amounts as trustor should have appointed (1) by the last written instrument in writing executed by trustor and delivered to trustee or (2), failing any such appointment, by her Last Will and Testament (R. 22).

Mrs. Donner attempted to exercise the power of appointment contained in the trust agreement by executing and delivering to Wilmington Trust Company an instrument dated December 3, 1949, which was the date of the execution of the Will, directing the manner whereby the trust fund should be distributed. This instrument was amended in a minor respect on July 7, 1950 (R. 30-34, 35-37). The attempted appointment by the instrument of December 3, 1949, as amended on July 7, 1950,³ provided for a plan of distribution which, insofar as the same is material in this cause,⁴ directed the trustee, Wilmington Trust Company, to pay over the sum of \$400,000.00 to Delaware Trust Company under two separate trusts dated November 26, 1948, created by Elizabeth Donner Hanson for the benefit of

3. Other earlier attempts were made to exercise the power of appointment but were revoked by the December 3, 1949, appointment. Many of the parties named below were named because provisions had been made for them in early revoked powers of appointment (R. 38-44, 45-46).

4. Dispositions other than those material herein totaling \$17,000.00 were included.

Joseph Donner Winsor and Donner Hanson in equal amounts, and the remainder to the Executrix of Mrs. Donner's last Will and Testament; Mrs. Hanson.

The Will did not provide for the payment of said sum of \$400,000.00 and, accordingly, if said power of appointment was invalid, the entire \$400,000.00 would also have gone to the Executrix of Mrs. Donner's last Will and Testament, Mrs. Hanson. The dispute involved is whether the \$400,000.00 should have gone as directed by said power of appointment or should have gone under the Will (A. 5a, 6a).

After Mrs. Donner's death, a dispute arose with respect to what assets passed under Mrs. Donner's Will in the State of Florida. A declaratory judgment action was commenced January 22, 1954, in the Circuit Court for Palm Beach County, Florida, by Katherine N. R. Denckla and Elwyn L. Middleton, guardian of the property of Dorothy B. R. Stewart, against Wilmington Trust Company, Delaware Trust Company and against other parties. The other parties were direct and contingent beneficiaries under said purported power of appointment and under previous powers of appointment and also direct and contingent beneficiaries under the Will.⁵ Of the named Defendants, Elizabeth Donner Hanson, individually and as Executrix under the Last Will and Testament of Dora Browning Donner, and as guardian for Donner Hanson, Joseph Donner Winsor and William D. Roosevelt, appeared (R. 172). The Circuit Court held on January 14, 1955, that, as between the appearing parties the trust instrument and powers of appointment appurtenant thereto were invalid and that the trust fund passed under the residuary clause of the Will of Mrs. Donner (R. 83). Upon appeal to the Supreme Court of the State of Florida, the Supreme Court affirmed

5. One remote, contingent beneficiary under the purported power of appointment, Curtin Winsor, Jr., was not named. He was represented by his mother, who was guardian *ad litem* for the primary beneficiaries, and he was also represented as a member of a class.

the Circuit Court on September 19, 1956, as to the invalidity of the power of appointment and the purported trust agreement and reversed with respect to the jurisdiction of the Court over non-answering defendants (A. 20a).

Elizabeth Donner Hanson fearing that she as a Florida resident and domiciliary might in some way be unfairly treated by the Florida Courts, had filed a declaratory judgment action in the Court of Chancery in Delaware on August 2, 1954, praying that the Court determine the persons entitled to participate in the trust fund and powers of appointment exercised pursuant thereto. The parties in the Delaware action are almost identical with those named in the Florida Circuit Court with the exception that certain servants of Mrs. Donner and Curtin Winsor, Jr., were named as defendants who were not named in the Florida action.

Both corporate trustees, Wilmington Trust Company and Delaware Trust Company, Joseph Donner Winsor, Curtin Winsor, Jr., Donner Hanson, Dorothy B. R. Stewart, William Donner Denckla, Dora Stewart Lewis, Mary Washington Stewart Borie and Paula Browning Denckla appeared in person or by guardian ad litem in the Delaware action. Your petitioners, together with Robert B. Walls, Jr., guardian *ad litem* for Dorothy B. R. Stewart and William Donner Denckla, comprised what the Delaware Supreme Court called the "Lewis group". The other individual defendants and the plaintiff were called the "Hanson group".

The Lewis group contends that the trust agreement is invalid and the exercise of the power of appointment was testamentary and ineffective to pass any interest, therefore, the entire trust fund should have passed under the Will of the decedent.

The Hanson group on the other hand maintains that the trust is valid and the transfer of the \$400,000.00 by the Wilmington Trust Company pursuant to the exercise of the power of appointment was sufficient to pass title. Adop-

tion of either group's contention would financially benefit the members of that group.

The Delaware Court of Chancery granted summary judgment in favor of the Hanson group on January 13, 1956, directly in the face of the prior Summary Final Decree of the Florida Circuit Court in favor of the Lewis group. On appeal the Delaware Supreme Court affirmed on February 7, 1957, and thus held for the Hanson group (A. 34a) even though the Florida Supreme Court previously had held for the Lewis group (A. 20a). Both Delaware courts refused to give full faith and credit to the Florida judgments.

REASONS FOR GRANTING THE WRIT.

The decision of the Delaware Supreme Court in the case below is directly in conflict with the decision of the Supreme Court of the State of Florida in *Hanson et al. v. Denckla et al.*, (A. 20a). This irreconcilable conflict between the Florida Supreme Court and the Supreme Court of the State of Delaware was recognized by the Delaware Court below when it characterized these cases as "a head-long jurisdictional collision between states" (A. 40a).

It has long been the policy of this Court to entertain writs of certiorari from a state court where there is a failure to give full faith and credit to a judgment of a sister state. *Roche v. McDonald*, 275 U. S. 449; *Adam v. Saenger*, 303 U. S. 59; *Milliken v. Meyer*, 311 U. S. 457; *Riley v. New York Trust Co.*, 315 U. S. 343.

The importance of this case can best be asserted by the simple statement that here the Delaware Courts said the Full Faith and Credit Clause is not binding (A. 59a).

The ultimate settlement of the main question presented here, what effect shall be given the Full Faith and Credit Clause to judgments of a sister state, would have a far reaching effect on all questions similar to the instant

ones. The situation created by the action of the Delaware Supreme Court would allow any number of different states to arrive at different decisions as to the validity of a single trust or will.

To your petitioners' knowledge, this Court has never passed upon the question involved in the instant case, i.e., whether the judgment of a Court of last resort of a decedent's domicile concerning assets which may or may not pass under the decedent's will or in the decedent's estate, and over which the Court has jurisdiction, must be given full faith and credit in a sister state where the personal property in question is physically located.

Your petitioners suggest that the Court below erred in refusing to give the judgment of the Florida Supreme Court the full faith and credit to which it was entitled. Contrary to the explicit holding of this Court in *Milliken v. Meyer, supra*, the Supreme Court of the State of Delaware, in passing upon the effect of the judgment of the Florida Supreme Court, held not only that the laws of Delaware and not those of Florida controlled the validity of the trust instrument, but that the Florida Supreme Court was in error on the merits! (A. 53a, 54a). A state court may never inquire into the logic or consistency of a decision of a sister state or the validity of the legal principles upon which the foreign judgment is based. *Milliken v. Meyer, supra*, *Fauntleroy v. Lum*, 210 U. S. 230.

Granting that the Delaware Court could inquire into the jurisdiction of the persons over which the Florida Court had control, *Baker v. Baker, Eccles, & Co.*, 242 U. S. 394, it could not hold that as between the appearing parties the Florida judgment was invalid. *Riley v. New York Trust Co., supra*. Both Delaware Courts held that the trust agreement was invalid both as to the parties which appeared in the Florida action and those who did not appear. No question was ever raised as to the jurisdiction over the persons who appeared in the Florida Court. The only holding was that since the action involved trust assets (personal

property) which were located in the State of Delaware and the corporate trustee was located in the State of Delaware, therefore, Delaware was the only Court with jurisdiction to pass upon the validity or invalidity of the trust (A. 42a). The Delaware Court held that since the trustees were non-appearing parties in the Florida action, the Florida Court had no jurisdiction to pass upon the trust validity, even though the Florida Supreme Court had held jurisdiction had been acquired over said trustees to adjudicate the questions involved (A. 52a-53a). As to the persons who appeared in the Florida action, there can be no doubt, but that they were and are personally bound by the decision of the Florida Supreme Court. However, the Delaware Supreme Court said "No"!

The Delaware Supreme Court actually reviewed and acted as an appellate court in dealing with the judgment of the Florida Supreme Court and in effect reversed it!

CONCLUSION.

For the foregoing reasons, this Petition for Certiorari should be granted.

Respectfully submitted,

• ARTHUR G. LOGAN;
LOGAN, MARVEL, BOGGS AND THEISEN,
400 Continental American Building,
Wilmington 1, Delaware,
*Attorneys for Dora Stewart Lewis,
Mary Washington Stewart Borie
and Paula Browning Denckla,
Petitioners.*

Appendix.

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

Civil Action No. 531

ELIZABETH DONNER HANSON, as Executrix and
Trustee under the Last Will of Dora Browning
Donner, deceased,

Plaintiff,

v.

WILMINGTON TRUST COMPANY, a Delaware corpora-
tion, as Trustee, et al.,

Defendants.

OPINION.

December 28, 1955

Action for declaratory judgment. Upon cross-motions
for summary judgment.

WILLIAM H. FOULK, of Wilmington, for the plain-
tiff Elizabeth Donner Hanson, Executrix and
Trustee

CALEB S. LAYTON (of Richards, Layton & Finger)
of Wilmington, for the defendant Wilmington
Trust Company, Trustee

EDWIN D. STEEL, Jr. (of Morris, Steel, Nichols &
Arsht) of Wilmington, Guardian Ad Litem
for the defendants, Joseph Donner Winsor,
Curtin Winsor, Jr. and Donner Hanson

JOSIAH MARVEL, ARTHUR G. LOGAN and AUBREY B. LANK of Logan, Marvel, Boggs and Theisen) of Wilmington, for the defendants; Dora Stewart Lewis, Mary Washington Stewart Berie and Paula Browning Denckla

ROBERT B. WALLS, Jr., of Wilmington, Guardian Ad Litem for the defendants, Dorothy B. R. Stewart and William Donner Denckla

DAVID F. ANDERSON (of Berl, Potter and Anderson) of Wilmington, for the defendant Delaware Trust Company, Trustee

HERRMANN, *Acting Vice Chancellor*:

The Court is called upon to decide (1) whether the doctrine of collateral estoppel precludes the parties from litigating in this action the issue of the validity of a certain written agreement as an *inter vivos* trust agreement; and, if not, (2) whether the trust and the exercises of the power of appointment thereunder are valid or invalid.

This action for declaratory judgment was brought by Elizabeth Donner Hanson, Executrix and Trustee under the Will of Dora Browning Donner, to determine the persons entitled to assets valued at \$417,000. The assets were held at the time of the death of Mrs. Donner by the defendant Wilmington Trust Company under an Agreement entered into by them in 1935. After Mrs. Donner's death, the assets were distributed by Wilmington Trust Company to certain recipients named in Instruments executed by Mrs. Donner in 1949 and 1950 in the exercise of the power of appointment reserved to her under the Agreement of 1935.

The case is before the Court upon four motions for summary judgment. Three of the motions are based upon the contention that the Agreement of 1935 created a valid trust, that the power of appointment thereunder was validly exercised in 1949 and 1950, and that the distributions

by Wilmington Trust Company pursuant thereto were properly made in discharge of its duty as Trustee under the Agreement. This is the position taken in the motions for summary judgment filed by the plaintiff, by Wilmington Trust Company, Trustee, and Edwin D. Steel, Jr., Guardian Ad Litem for three minor defendants, Joseph Donner Winsor, Gurtin Winsor, Jr. and Donner Hanson, grandchildren of Mrs. Donner. Opposed to this position is the cross-motion for summary judgment filed by the defendants Dora Stewart Lewis, Mary Washington Stewart Borie and Paula Browning Denekla, other grandchildren of Mrs. Donner. These defendants contend that by application of the doctrine of *res judicata* or collateral estoppel, or by reason of applicable principles of law, this Court must conclude that the Agreement of 1935 was an agency agreement and not a trust agreement; that, therefore, the Instruments of 1949 and 1950 were invalid testamentary acts and the transfer of assets by Wilmington Trust Company thereunder was erroneous because such assets should have been distributed under the Will of Mrs. Donner. These defendants cross-claim and seek a judgment against Wilmington Trust Company in the amount of \$417,000. The defendant Delaware Trust Company, Trustee, supports the motions of the proponents of the Trust. Robert B. Walls, Jr., Guardian Ad Litem for the defendants Dorothy B. R. Stewart and William Donner Denekla, incompetent daughter and minor grandson of Mrs. Donner, supports the motion of the opponents of the Trust. The pending motions are based upon the pleadings and exhibits thereto, affidavits, depositions and certified copies of the Florida proceedings hereinafter discussed.

There does not appear to be any genuine issue as to any of the following facts:

1. The plaintiff has been barred from proceeding further herein by an injunction issued to her by the Circuit Court of the Fifteenth Judicial Circuit of Florida, in and for Palm Beach County, pursuant to the decree of that Court hereinafter discussed.

Under the Agreement with Wilmington Trust Company, dated March 25, 1935, Mrs. Donner transferred to it certain designated securities. The Agreement provided that Wilmington Trust Company, as Trustee, should pay the net income of the trust fund to Mrs. Donner for life and, upon her death, should transfer the trust fund, free from the trust, "unto such person or persons * * * as Trustor shall have appointed by the last instrument in writing which she shall have executed and delivered to Trustee."

Thereafter, Mrs. Donner executed and delivered to Wilmington Trust Company an Instrument, dated December 3, 1949, in which, after revoking earlier Instruments by which she purportedly had exercised her power of appointment, she again purported to exercise the power of appointment by directing that, upon her death, the Trustee should transfer the trust fund as follows: (1) \$4,000 to three named individuals; (2) \$1,000 to each of certain servants; (3) \$10,000 to Louisville Trust Company in trust for Benedict H. Hanson, a son-in-law of Mrs. Donner; (4) \$10,000 to the Bryn Mawr Hospital; (5) \$200,000 to the Delaware Trust Company in trust for Joseph Donner Winsor; (6) \$200,000 to the Delaware Trust Company in trust for Donner Hanson; and (7) the residue to the Executrix under Mrs. Donner's Will to be dealt with as stated therein. Mrs. Donner thereafter executed and delivered to Wilmington Trust Company an Instrument, dated July 7, 1950, which purported to partially revoke the Instrument of December 3, 1949 by deleting therefrom the provision for \$10,000 to the Louisville Trust Company, Trustee. In all other respects, the Instrument of 1950 confirmed the Instrument of 1949.

At the time of the execution of the Agreement of 1935, Mrs. Donner was a resident of Pennsylvania. The securities referred to in the Agreement were delivered to Wilmington Trust Company in Delaware and they remained in Delaware in the possession of and under the administration of

the Trust Company. Wilmington Trust Company has no place of business and transacts no business outside of Delaware.

When Mrs. Donner died in 1952, she was a resident of Palm Beach County, Florida, and had been such since 1944. The Will of Mrs. Donner, dated December 3, 1949, was probated there and the plaintiff herein, Elizabeth Donner Hanson, duly qualified as Executrix under the Will. After bequeathing her personal and household effects to Mrs. Hanson and Dora Donner Ide, two of her daughters, Mrs. Donner made the following disposition of the residue of her property "including any and all property, rights and interest over which I may have power of appointment which prior to my death has not been effectively exercised by me or has been exercised by me in favor of my Executrix":

(1) Payment of all death taxes on property appointed by Mrs. Donner under the 1935 Agreement; and (2) the balance to be divided into two equal parts: (a) one part to Delaware Trust Company in trust for Katherine N. R. Denckla, another daughter; and (b) the other part to Mrs. Hanson in trust for Dorothy B. Rodgers Stewart, another daughter, during her lifetime and after her death to Delaware Trust Company in trust for Mrs. Denckla.

When Mrs. Donner died, the securities and cash held by Wilmington Trust Company under the 1935 Agreement amounted to \$1,493,629.91. Thereafter, Wilmington Trust Company distributed cash and securities aggregating \$417,000 in accordance with the provisions of the Instruments of 1949 and 1950 and deposited the balance to the account of Mrs. Hanson as Executrix and Trustee under the Will of Mrs. Donner. None of the trust funds distributed to Delaware Trust Company, Trustee, have ever been held or administered outside of Delaware.

In January 1954, Mrs. Denckla and Elwin L. Middleton, guardian of the property of Mrs. Stewart, brought an action in the Circuit Court of Palm Beach County, Florida, against Mrs. Hanson, individually and as Executrix of Mrs.

Donner's Will, Wilmington Trust Company, Delaware Trust Company and others who, were interested in the assets, directly or beneficially, by reason of appointment or the residuary clause of the Will: The Florida action sought a declaratory judgment determining what passed under the Will and the authority of the Executrix over the assets held by Wilmington Trust Company under the 1935 Agreement. Neither Wilmington Trust Company, Delaware Trust Company nor any of the other appointees under the Instrument of 1949, named defendants in the action, were served personally and they did not appear in the action. None of the assets held by Wilmington Trust Company under the Agreement of 1935 have ever been held or administered in Florida. On January 14, 1955, a "summary final decree" was entered by the Florida Court holding (1) that the Court lacked jurisdiction over the assets in Delaware and over Wilmington Trust Company, Delaware Trust Company, and the other non-answering defendants and that the complaint be dismissed without prejudice as to all such defendants; and (2) that no present interest passed to any beneficiary other than Mrs. Donner under the Agreement of 1935 and the Instrument of 1949 and that the Instrument was testamentary in character and invalid as a testamentary disposition because it was not subscribed by two witnesses as required by Florida law; and (3) that, therefore, as to the parties before the Florida Court, the assets held by Wilmington Trust Company under the Agreement of 1935 passed under the residuary clause of Mrs. Donner's Will.

In the meanwhile, in July 1954, the instant action was begun by Mrs. Hanson as Executrix and Trustee under Mrs. Donner's Will. Named herein as defendants are Wilmington Trust Company as Trustee, Delaware Trust Company as Trustee, the appointees named in the Instruments of Appointment executed by Mrs. Donner, residuary legatees under Mrs. Donner's Will and others having beneficial interests. The complaint herein alleges that it was filed be-

cause of the desire of the Executrix to settle the matters in controversy finally and conclusively "as to all parties so that she may effectively perform all of her duties, account as Executrix and enter upon her duties as Trustee." The complaint alleges that no part of the assets involved were located in Florida and that Wilmington Trust Company, Delaware Trust Company and certain other indispensable parties were not before the Florida Court; that, therefore, that Court could not render "an effective and binding decree." The prayer of the complaint in this action is that this Court determine by declaratory judgment the persons who, at the time of Mrs. Donner's death, were entitled to participate in the assets held in trust by Wilmington Trust Company under the 1935 Agreement.

I. COLLATERAL ESTOPPEL

The first question to be decided is whether by reason of the Florida decree, the parties hereto are precluded from litigating in this action the issue of the validity of the Agreement of 1935 as a trust agreement. This is the ultimate question because the validity of the exercises of the power of appointment depends, in this case, upon the validity of the basic Agreement. See *Wilmington Trust Company, et al. v. Wilmington Trust Company, et al.*, 26 Del. Ch. 397, 24 A. (2d) 309, 312.

The opponents of the Trust assert the doctrines of *res judicata* and collateral estoppel. The doctrine of *res judicata* is not applicable because the Florida action and this action involve different causes of action. The refinement of the *res judicata* doctrine known as the doctrine of collateral estoppel may be applicable, however, the difference in causes of action notwithstanding. See *Niles v. Niles*, — Del. Ch. —, 111 A. (2d) 697; *Petrucci v. Landon*, — Terry —, 107 A. (2d) 236; *Scott*, "Collateral Estoppel by Judgment", 56 Harv. L. Rev. 1. The question, then, is whether the doctrine of collateral estoppel may be invoked as an affirmative defense by the opponents of the Trust to pre-

clude the other parties from obtaining a determination by the courts of this State as to the validity of the Trust. I am of the opinion that this question must be answered in the negative.

The Florida Court made determinations incidentally that it would not have had the jurisdiction to make directly. The action before the Florida Court was brought to determine what passed under the residuary clause of the Will of Mrs. Donner, a Florida domiciliary. As necessary but incidental determinations in that action, the Florida Court concluded that the Agreement of 1935 was invalid as a trust agreement and that, therefore, the exercise of the power of appointment in 1949 was testamentary.²

In a direct proceeding, the Florida Court would not have had the jurisdiction to determine the essential validity of an *inter vivos* trust created in Delaware, all of the assets of which were in Delaware and the Trustee of which is a Delaware corporation which was not before the Court. Since neither the Trust *res* nor the Trustee were within the jurisdiction of the Florida Court, it is clear that that Court could not have determined the essential validity of the purported Trust in a direct proceeding brought for the purpose. 45 Am. Jur. "Trusts" §§ 564, 584; *Lines v. Lines*, 142 Pa. 149, 21 A. 809; compare *In re Harriman's Estate*, 124 Misc. Rep. 320, 208 N. Y. S. 672; *Harvey, et al. v. Fiduciary Trust Co., et al.*, 299 Mass. 457, 13 N. E. (2d) 299; *Land*, "Trusts in the Conflict of Laws", Secs. 41, 43.

The principle is settled that where a court has incidentally determined a matter which it would have had no jurisdiction to determine directly, the judgment is not conclusive in a subsequent action brought to determine directly

2. The decree of the Florida Court contained no expressed conclusion regarding the invalidity of the Agreement of 1935 as an agreement of trust. Since, however, such determination must have been made before the Court could reach the expressed conclusion that the exercise of the power was testamentary, the prerequisite determination as to the invalidity of the Agreement must be said to be implicit in the decree.

such incidental matter. In his important and widely quoted discussion of *Collateral Estoppel by Judgment*, 56 Harv. L. Rev. 1, 18, Professor A. W. Scott states:

"* * *. It may happen, however, that the court has jurisdiction to determine the cause of action, but that in determining it the court must necessarily decide a question which it would have no jurisdiction to determine in an action brought expressly for its determination. In such a case the judgment of the court is valid, and the cause of action will be extinguished, the judgment operating by way of merger or bar. The question then arises as to the effect by way of collateral estoppel of the determination of the particular matter on which the judgment was based. Although the authorities are somewhat meager, it seems clear that the judgment should not preclude the parties as to the matter in a subsequent action between them brought expressly to determine the matter in a court which has jurisdiction to determine it. It seems clear, also, that after such determination in a subsequent suit, it is the determination of the court in that suit, and not the incidental determination in the prior suit, which is conclusive between the parties."

See also *Restatement of Judgments*, § 71; *Petrucchi v. Landon*, *supra*; dissent of Rutledge, J. in *Geracy v. Hoover*, 77 U. S. App. D. C. 55, 133 F. (2d) 25, 147 A. L. R. 185.

In the final analysis, the question becomes one of public policy. At 56 Harv. L. Rev. 1, 22, Professor Scott states:

"The question in all these cases is one of public policy. Should a court which has not been entrusted with jurisdiction to determine a matter directly be permitted to determine it incidentally, not merely for the purpose of deciding the controversy which it can

properly decide, but also with the effect of precluding the parties from litigating the question in those courts which alone are entrusted with jurisdiction to determine it directly?"

This eminent authority on the subject concludes with the admonition that the application of the doctrine of collateral estoppel must always be based upon a sound public policy and that care "must be exercised in its application to see that it works no injustice."

It is my opinion that it would be contrary to sound public policy for this Court to consider itself bound and divested of its duty to determine the essential validity of a Delaware *inters vivos* trust in a direct proceeding brought for the purpose on the ground that a Court in a sister jurisdiction has incidentally determined the matter in another cause of action in which neither the trust *res* nor the Trustee was before the Court. The doctrine of collateral estoppel is a judge-made rule. I do not think that it should be enlarged to the extent of depriving the parties herein of a direct determination by this Court as to the validity of the Trust.

Since the purported Trust was created in Delaware and since the assets have been held by the Trustees in Delaware at all times, the "home" of the Trust is in Delaware and its validity must be determined by the law of Delaware. *Wilmington Trust Company, et al. v. Wilmington Trust Company, et al., supra; Wilmington Trust Company v. Sloane*, 30 Del. Ch. 103, 54 A. (2d) 544. This is a case of first impression in this State as to an important phase of the question of the validity of the Trust. The law of this State must be formulated here. It would be contrary to public policy for the Courts of this State to relinquish their duty of enunciating the law controlling a trust having its situs in Delaware and to thereby relegate the Trustee and the Trust *res* here involved to the law prevailing in another jurisdiction. Compare *Taylor, et. al. v. Croson, et al.*, 11 Del. Ch. 445, 98 A. 375.

Moreover, the application of the doctrine of collateral estoppel might work injustice in this, a case which involves only questions of law. It could mean that the parties who were before the Court in the Florida action would be subjected to one conclusion of law while Wilmington Trust Company, Delaware Trust Company and other appointees and beneficiaries, who did not appear in the Florida action, would be controlled by a different rule of law. This could mean that (1) as to the parties before the Florida Court, the disposition of assets would be governed by the residuary clause of the Will, but (2) as to the parties who were not before the Florida Court, the disposition of assets would be governed by the terms of the 1935 Agreement and the exercises of the power of appointment thereunder. This would result in chaos and injustice. The possibility of such result militates against application of the doctrine of collateral estoppel in any case. See *Restatement of Judgments*, § 70 and *com. f*, 1948 Supp.; *Scott "Collateral Estoppel by Judgment"*, 56 Harv. L. Rev. 1, 10.

The opponents of the Trust place principal reliance upon *Niles v. Niles*, *supra*. That case is not applicable because there the issue previously determined incidentally by the New York Court also arose incidentally before the Chancellor. I do not consider anything stated herein to be in conflict with the decision in the *Niles* case. The other cases cited by the opponents of the Trust have been examined and have been found to be inapposite. See *Slater v. Slater*, 372 Pa. 519, 94 A. (2d) 750; *Ugust v. LaFontaine*, 189 Md. 227, 55 A. (2d) 705; *United States v. Silliman* (C. C. A. 3) 167 F. (2d) 607; *William Whitman Co. v. Universal Oil Products Co.* (D. Del.) 92 F. Supp. 885; *United States v. Moser*, 274 U. S. 225, 47 S. Ct. 616.

It is concluded that no determination made in the Florida action is conclusive in this action as to the validity of the Agreement of 1935 as a trust agreement. The parties herein will not be precluded by the defense of collateral

estoppel from obtaining the decision of this Court upon that issue.

II. ESSENTIAL VALIDITY OF THE TRUST AGREEMENT

In order to determine the essential validity of the Agreement of 1935 as a trust agreement, it is necessary to consider its pertinent provisions in some detail.

The Agreement was a formal document, executed by Mrs. Donner and Wilmington Trust Company, in which Mrs. Donner was referred to as Trustor and Wilmington Trust Company was referred to as Trustee. It was recited that the Trustor "desires to establish a trust of certain securities and property" referred to as the "trust fund". It was stated that the Trustor thereby "assigned, transferred and delivered" certain listed securities and property to the Trustee in trust to "hold, manage, invest and reinvest the trust fund, collect the income thereof and pay out of such income all taxes, charges and expenses payable thereof". The Agreement provided for the payment of the net income of the trust fund to the Trustor during her lifetime and, upon her death, the Trustee was directed to convey the fund "free from this trust, unto such person or person and in such manner and amounts and upon such trusts, terms and conditions as Trustor shall have appointed by the last instrument in writing which she shall have executed and delivered to Trustee"; or in the absence of such instrument, "by her Last Will and Testament, or in default of any such appointment then unto the then living issue of Trustor, per stirpes and not per capita". In default of exercise of the power of appointment and living issue, the fund was to go to the Trustor's next of kin. The Agreement then conferred upon the Trustee all of the ordinary general and broad powers usually conferred upon a Trustee, including the power to retain any and all stocks and securities, to sell and exchange the same, to invest the proceeds of any

sales, to vote stock, to participate in reorganizations, to determine whether expenses and other disbursements shall be charged against income or principal, and to hold bearer securities in its own name or in the name of its nominees. It was provided, however, that the Trustee shall exercise its power to sell or exchange trust property, to invest the proceeds of any such sale or other available money and to participate in plans of reorganization, merger, etc., only upon the written direction of, or with the written consent of the Adviser of the trust; provided that if there should be no Adviser, or if the Adviser should fail to act within a ten day period, the Trustee might exercise all such powers and "take such action in the premises as it, in its sole discretion, shall deem to be for the best interest of the beneficiary of this trust". The Trustor named as Adviser her husband or "such other person or persons as Trustor may nominate in writing delivered to Trustee during her lifetime". The Trustor reserved the right to amend or revoke the Trust Agreement in whole or in part and, further, she reserved the right to change the Trustee.

Thus, by the Agreement of 1935, Mrs. Donner reserved to herself the following significant rights and powers: (1) the right to all of the net income for life; (2) the right to amend or revoke the Agreement in whole or in part; (3) the right to change the Trustee; (4) the right to name and change an investment Adviser. The question here presented revolves about those reservations. The opponents of the Trust contend that the cumulation of the reservations created an agency relationship between Mrs. Donner and the Wilmington Trust Company and not a trust relationship; that, therefore, the disposition, insofar as it was intended to take effect after Mrs. Donner's death, was testamentary and invalid for failure to comply with the Florida law relating to the validity of Wills.

It is my opinion that under the law of this State, which governs the essential validity of the Agreement of

1935 as a trust agreement, the reservations of rights and powers made therein by Mrs. Donner did not defeat the *inter vivos* trust she so clearly intended to create by that Instrument.

The law seems settled as to the first three reservations here involved. *Equitable Trust Co. v. Paschall, et al.*, 13 Del. Ch. 87, 115 A. 356, stands for the proposition that the reservation of a life interest plus the reservation of the power to revoke an *inter vivos* trust does not invalidate the trust. See also *1 Scott on Trusts*, § 57.1; *Restatement of Trusts*, § 57; *1 Bogert, Trusts and Trustees*, p. 483; *Leahy v. Old Colony Trust Co.*, 326 Mass. 49, 93 N. E. (2d) 238. Furthermore, the power of the settlor of an *inter vivos* trust to change the trustee has judicial sanction in this State. See *Wilmington Trust Co., et al. v. Wilmington Trust Co., et al.*, *supra*.

The brunt of the attack on the Agreement of 1935 is centered upon its provisions for the appointment of an investment Adviser and the requirement that the Trustee be governed by the Adviser as to (1) any sale or exchange of trust property; (2) any investment of the proceeds of such sale or of other available money; and (3) any participation in plans of reorganization, merger, etc., of any company in which the Trustee might hold securities. It appears that the effect of such provisions upon the validity of an *inter vivos* trust has not been directly decided in this State.

It seems to be settled that an intended *inter vivos* trust does not become testamentary because the trustor reserves the power to direct the trustee as to the making of investments. See *Restatement of Trusts*, § 57(2) and comment thereon; *1 Scott on Trusts*, § 57.2; *1 Bogert, Trusts and Trustees*, § 104; *National Shawmut Bank of Boston v. Joy*, 315 Mass. 457, 53 N. E. (2d) 113, 125. If the trustor may personally direct or veto investments by the trustee without impairing the validity of an *inter vivos* trust, it would seem to follow that the trustor may assign

that authority to a third party, called "adviser", without destroying the validity of the trust. Such investment counselor has been considered to be a fiduciary, a co-trustee or a quasi-trustee. See *Gathright's Trustee v. Gaut*, 276 Ky. 562, 124 S. W. (2d) 782 and *Annotation* 120 A. L. R. 1407; *Restatement of Trusts*, § 185; *Scott on Trusts*, § 185; 1 *Bogert, Trusts and Trustees*, p. 536. In *Equitable Trust Co. v. Union National Bank*, 25 Del. Ch. 281, 18 A. (2d) 288, this Court found it unnecessary to determine whether or not an investment adviser was a fiduciary. Whatever the precise relationship between the Trustor and the Adviser or the Trustee and the Adviser may be called, I think it is clear that if Mrs. Donner might have reserved to herself the power to specify investments and to direct or veto the Trustee as to investment policy, without impairing the validity of the *inter vivos* Trust, she may properly delegate that power to another without destroying the *inter vivos* Trust she so clearly intended to create.

The intent of the Trustor is a critical and controlling factor in determining whether an agency or a trust was created by the Agreement of 1935. See 1 *Scott on Trusts* (1954 Supp.) § 57.2, p. 74. It is beyond question, I think, that it was Mrs. Donner's intent that the 1935 Agreement should create an *inter vivos* trust. In the document, she called herself "Trustor", she called Wilmington Trust Company "Trustee" and she referred to the "trust fund" she was thereby conveying to the Trustee:

It appears that there is no established limit to the nature or extent of the powers which the settlor of a valid *inter vivos* trust may reserve so long as the settlor does not reserve the right to control the trustee as to the details of the administration of the trust. If, however, the settlor reserves such power to control the trustee as to the details of the administration of the trust as to make the trustee a mere agent of the settlor, the disposition may be testamentary so far as it is intended to take effect after the

settlor's death. See *Restatement of Trusts*, § 57(2); 1 *Bogert, Trusts and Trustees*, § 104, p. 490.

In the Agreement of 1935, Mrs. Donner did not reserve to herself control over the details of the administration of the Trust as would constitute the Trustee an agent under the principle above stated. In the Agreement, she conveyed title and broad powers to the Trustee limited only by the obligation of the Trustee to consult and follow the advice of the investment counselor. The opponents of the Trust contend, however, that an examination of the actual operation of the Trust Fund, as disclosed by affidavits and depositions, reveals that the Trustee permitted the Adviser to usurp all of its powers and functions as to the details of administration and that, in reality, the Trustee was nothing more than a custodian of the securities.

Under the circumstances of this case, the *modus operandi* adopted by the Trustee and the Adviser is immaterial to the question of whether the Agreement of 1935 created a relationship of trust or of agency. In the absence of ambiguity, fraud, duress or mistake, the intent of the Trustor and the nature of the relationship created by the Agreement of 1935 is to be determined from the face of the Instrument itself. See *Restatement of Trusts*, § 38(2); Comment a. There is no showing that Mrs. Donner knew of the facts relied upon by those who assert an agency instead of a trust, nor is there any showing that she was in any way responsible for any surrender of function which may have taken place as between the Trustee and the Adviser in the operation of the trust. Even if we disregard its vigorous denials and assume that the Trustee abandoned its powers and duties to the Adviser, as asserted by the opponents of the Trust, such situation would not convert a trust agreement into an agency agreement in the absence of the knowledge or consent of Mrs. Donner. A trustor, intending to create an *inter vivos* trust, may not be thwarted by an *ex parte* act or failure to act on the part of the trustee.

It is manifest upon the face of the Agreement that an *inter vivos* trust was intended. Effect will be given to the Agreement in accordance with its plain terms so that the clear intent of the Trustor will not be defeated.

The opponents of the Trust place principal reliance upon *Restatement of Trusts*, § 56; *In re Pengelly's Estate*, 374 Pa. 358, 97 A. (2d) 844; *Frederick's Appeal*, 52 Pa. 338; and *Hurley's Estate*, 16 Pa. D. & C. 521. In *Restatement of Trusts*, § 56, it is stated that if no interest passes to the beneficiaries before the death of the settlor, the intended trust is testamentary. That principle is not applicable in the instant case because present interests were created at the time of the execution and delivery of the Agreement of 1935 and the exercises of the power of appointment thereunder. The Agreement provided for an ultimate disposition of the assets to "then living issue of Trustor", subject to defeasance by revocation or exercise of the power of appointment. Present interests were thus created when the Agreement and exercises thereunder were executed, even though such interests could not fall into possession until after the death of Mrs. Donner and even though such interests might be ultimately defeated by further exercise of the power of appointment or by revocation. See 1 *Bogert, Trusts and Trustees*, pp. 481-483; *Restatement of Property*, § 157, Comments P, Q and R; *Gray on Perpetuities*, § 112; *Simes, Future Interests*, § 80; *Leahy v. Old Colony Trust Co.*, *supra*. Since present interests passed under the Agreement and the exercises of the power of appointment and only the enjoyment thereof was postponed until the Settlor's death, the *inter vivos* trust here is not defeated by application of the principle stated in § 56 of the *Restatement of Trusts*. See *Brown v. Pennsylvania Company*, 2 W. W. Harr. 525, 126 A. 715; *Security Trust & Safe Deposit Co. v. Ward*, 10 Del. Ch. 408, 93 A. 385; *Wilmington Trust Co. et al. v. Wilmington Trust Co.*, *et al.*, *supra*; *Restatement of Trusts*, § 57(1); 1 *Scott on Trusts*, § 57.1.

The case of *In re Pengelly's Estate, supra*, does not aid the opponents of the Trust because that case is distinguishable on its facts. There it was found by the Court that the trust instrument merely continued a previously existing agency relationship and the Settlor had reserved complete power to control the Trustee in the administration of the trust. Moreover, the Court in the cited case was concerned with the public policy requiring protection of the rights of widows. The cases of *Frederick's Appeal, supra*, and *Hurley's Estate, supra*, are likewise clearly distinguishable on their facts and of no assistance.

It is held that the Agreement of 1935 created a valid *inter vivos* Trust. Since the Trust was valid, the exercises of the power of appointment thereunder by the Instruments of 1949 and 1950 were valid. *Wilmington Trust Co., et al., v. Wilmington Trust Co., et al., supra*. Accordingly, the distributions made by Wilmington Trust Company constituted a proper discharge of its duties as Trustee under its Agreement with Mrs. Donner.

The motions for summary judgment filed by the Lewis defendants will be denied. The other motions for summary judgment filed herein will be granted.

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

CIVIL ACTION No. 531

ELIZABETH DONNER HANSON, as Executrix and Trustee
under the Last Will of Dora Browning Donner, de-
ceased,

Plaintiff,

v.

WILMINGTON TRUST COMPANY, a Delaware corporation, as
Trustee, et al.,

Defendants:

ORDER.

AND NOW, To Wit: this 25 day of January, A.D. 1956,
the Motion of Dora Stewart Lewis, Mary Washington
Stewart Borie and Paula Browning Denckla, For New Trial
pursuant to Rule 59 of the Rules of the Court of Chancery
of the State of Delaware, filed herein on January 20, 1956,
having come on to be heard, It Is

ORDERED, ADJUDGED and DECREED that the said Motion
For New Trial filed herein by Dora Stewart Lewis, Mary
Washington Stewart Borie and Paula Browning Denckla,
be and the same hereby is denied.

/s/ D. L. HERRMANN,

Judge.

IN THE SUPREME COURT OF FLORIDA

JUNE TERM, A. D. 1956

SPECIAL DIVISION A.

ELIZABETH DONNER HANSON, Individually
and as Executrix, et al.,*Appellants,*

v.

KATHERINE N. R. DENCKLA, Individually
et al.,*Appellees.*

Case No. 27,622.

OPINION.

Opinion filed September 19, 1956.

An Appeal from the Circuit Court for Palm Beach County,
C. E. Chillingworth, Judge.

Caldwell, Pacetti, Robinson & Foster and Manley P. Caldwell for Elizabeth Donner Hanson, Individually, as Executrix of the Will of Dora Browning Donner, Deceased, as Guardian Ad Litem for Joseph Donner Winsor and Donner Hanson and William Donner Roosevelt, Individually; McCarthy, Lane & Adams, Edward McCarthy and William H. Foulk (Wilmington, Delaware) for Elizabeth Donner Hanson as Guardian Ad Litem for Joseph Donner Winsor and Donner Hanson, Appellants.

C. Robert Burns and Redfearn & Ferrell, for Appellees.

HOBSON, J.:

This is an appeal by defendants from a summary final decree holding that assets of a trust created by Dora Donner during her lifetime passed under her will. Cross-

assignments of error have been filed by the plaintiffs, who contend that the chancellor erred in holding that he had no jurisdiction over some of the defendants, the trustee and certain beneficiaries under the trust, who did not answer the complaint.

The essential facts of the case are not in dispute. Dora Donner died in Palm Beach, Florida, on November 20, 1952, leaving a will dated December 3, 1949, which was probated in Palm Beach County. She was formerly a citizen of Pennsylvania, but made her permanent home in Palm Beach County on or about January 15, 1944, and remained domiciled in Florida until she died.

On March 25, 1935, the testatrix executed a trust instrument in which she named the Wilmington Trust Company, a Delaware corporation, as trustee. The trust instrument provided in part as follows:

"Trustee shall pay over the net income of the trust fund unto Trustor, for and during the term of her natural life. Upon the death of Trustor Trustee shall assign, transfer, convey and deliver this trust fund, principal and undistributed income thereof, if any, free from this trust, unto such person or persons and in such manner and amounts and upon such trusts, terms and conditions as Trustor shall have appointed by the last instrument in writing which she shall have executed and delivered to Trustee, or failing such instrument, by her last Will and Testament, or in default of any such appointment then unto the then living issue of Trustor, per stirpes and not per capita."

The trust assets consisted entirely of intangible personalty.

On April 6, 1935, Mrs. Donner executed a power of appointment under the terms of the trust. On October 11, 1939, she executed a new power of appointment, amending the previous power.

On December 3, 1949, (the same day she executed her will, and while domiciled in Florida) Mrs. Donner executed

an instrument entitled "DONNER * FIRST POWER OF APPOINTMENT" wherein she revoked all previous exercises of the power of appointment under the trust and ordered that certain sums be paid to a different set of beneficiaries.

On July 7, 1950, she executed an instrument entitled "DONNER * SECOND POWER OF APPOINTMENT" amending the instrument of December 3, 1949. This was the last "power of appointment" the testatrix exercised before her death.

In her will, after making certain specific directions and bequests, the testatrix provided in part as follows:

"FIFTH: All the rest, residue and remainder of my estate, real personal and mixed, whatsoever and wheresoever the same may be at the time of my death, *including any and all property, rights and interest over which I may have power of appointment which prior to my death has not been effectively exercised by me or has been exercised by me in favor of my Executrix*, I direct my Executrix to deal with as follows, namely:" [Here follow certain directions and the names of residuary legatees, plaintiff-appellees here.] (Emphasis supplied.)

The complaint for declaratory decree in this case was filed for the purpose of determining what passes under the residuary clause of the will quoted above. This determination, of course, requires a study of the trust agreement of March 25, 1935, and the powers of appointment exercised thereunder, to determine whether or not such powers as the testatrix had were "effectively exercised" under the terms of the will. On this issue, the chancellor held in part:

"Concerning the declaration of trust dated March 25, 1935, and particularly the power of appointment dated December 3, 1949, no present interest passed to any beneficiary other than the Trustor (Testatrix). It seems clear to me, from the authorities, that the power of appointment was testamentary in character

and did not constitute a valid inter vivos trust appointment. As the appointment had only one subscribing witness, rather than two, as required in Florida, it did not constitute a valid testamentary disposition. Hence, the executrix should receive the assets and dispose of them agreeable to the will under which she was appointed."

After this final decree was entered, a suit which had been brought in Delaware by Elizabeth Donner Hanson, as executrix and trustee under the Donner will (one of the appellants herein) to determine the validity of the trust agreement resulted in a summary judgment of the Court of Chancery of the State of Delaware in and for New Castle County, holding that the trust was valid. An appeal from this judgment is pending in Delaware but, so far as the record here before us shows, has not yet been determined.

Appellants have lodged with us a copy of the Delaware chancellor's opinion and judgment and, on the basis thereof, have moved to remand the instant case with directions to dismiss it, taking the position that the Delaware judgment is dispositive of the main issue raised on this appeal.

We shall first consider the contention of appellants that the circuit court of Palm Beach County erred in holding the trust and the powers of appointment exercised thereunder invalid as testamentary in character. As a preliminary inquiry, it is necessary to determine whether or not jurisdiction existed in the courts of Florida to pass upon the validity of these instruments.

There can be no doubt that the court below possessed substantive jurisdiction to determine this issue. Jurisdiction existed by virtue of the will, which had been duly probated in Florida, the testatrix' domiciliary state. Reference having been made in the will, as we have seen, to powers of appointment, and the question of effective exercise thereof having been properly raised, the chancellor

below had no alternative but to examine the trust instrument and documents executed thereunder and declare them valid or invalid. This is to be distinguished from a case wherein questions of administration or validity of a purported inter vivos trust arise absent a will or any reference therein. Cf. *Wilmington Trust Co. v. Wilmington Trust Co.*, Del., 24 A. 2d 309, where the settlor had executed a will "making no reference whatever to the power of appointment conferred on him by the [previously executed] trust agreement . . ." and it was held that the Delaware courts had jurisdiction to determine the validity of trust powers, although the settlor died a domiciliary of another state. In the case now presented, it would have been an abdication or abandonment of jurisdiction, which we would have been obliged to correct, if the chancellor below had failed to answer the question which was duly brought before him for adjudication.

The next question is the source of the applicable law to test the validity of the attempted trust disposition. The trustee, Wilmington Trust Company, is a Delaware corporation with its principal place of business in Delaware. Securities representing the intangible personalty which forms the corpus of the trust are also located in Delaware. The settlor was domiciled in Pennsylvania when she executed the original trust instrument. The first two "powers of appointment", now revoked, were executed while the settlor was domiciled in Pennsylvania. But these considerations alone are insufficient to persuade us that the law of either Delaware or Pennsylvania is applicable, for reasons which will hereinafter appear.

Assuming, for the moment, that this was an inter vivos trust, the only exercises of the power of appointment which could have been intended to create an interest to be enjoyed at the settlor's death were those reflected in the documents of 1949 and 1950. The settlor obviously intended these documents, if any, to make the controlling disposition, for she revoked all previous exercises of the

power and even called the 1949 and 1950 papers the "first" and "second" power of appointment respectively, although she had previously executed similar instruments. The chancellor in Delaware, in expressing his opinion that the trust was valid under Delaware law, sanctioned payment to the remaindermen named in these last two powers of appointment. In the last analysis we, too, are concerned with the interests of these remaindermen in our inquiry as to whether or not the instruments which created their interests were effective to shift the trust property out of the estate of the testatrix. We do not question the validity of the beneficial life estate reserved by the settlor.

It is urged upon us that the remaindermen possessed during the life of the settlor a present right of (sic) future enjoyment of the trust property. In making this argument, appellants state in part in their brief that:

" . . . since the right to amend is specifically reserved in the Trust Agreement of March 25, 1935, *each appointment should be construed as an amendment to and a republication of the original agreement.* Therefore, the trust agreement and appointments thereunder must always be construed together." (Emphasis supplied.)

In *Henderson v. Usher*, 118 Fla. 688, 160 So. 9, we observed that an inter vivos trust usually has its situs at the residence of the creator of the trust, and we were considerably influenced in our consideration of this principle by the case of *Swetland v. Swetland*, 105 N. J. Eq. 608, 149 A. 50; *Id.*, 107 N. J. Eq. 504, 153 A. 907, which we viewed as "one of the leading cases in this country on the question". In the *Swetland* case the settlor had amended the trust, but had been domiciled in New Jersey both at the time of his execution of the original trust agreement and the amendment thereto. It was held that New Jersey law applied to test both agreements. The court in the *Swetland* case rejected the contention that the applicable law as to the trust necessarily followed the settlor wherever he might be

domiciled after the trust was executed, and it is unnecessary for us to express any opinion regarding this principle. It is sufficient to observe that in the instant case the last effective acts, if any there were, of the settlor to establish remainder interests under the trust were accomplished while she was a Florida domiciliary, and we consider the last powers of appointment as a republication of the original trust instrument, or as if the trust instrument had been executed while the settlor was domiciled in Florida. We consider this a far more realistic interpretation of these instruments than if we were to rule that the last powers of appointment should be construed to relate back to the date upon which the original trust agreement was executed, because the effect of a "relation-back" view would be to establish an artificially early date for interests which were obviously not intended to be created by the settlor until much later. Hence we must consider the validity of the trust, and the remainder interests it sought to create, under Florida law, *Henderson v. Usher*, *supra*, 118 Fla. 688, 160 So. 9. Compare the rule sustaining the power of the domiciliary state to tax, and apply its tax law to, the exercise of a power to dispose of intangibles, although the trust fund and trustee are outside the state. *Graves v. Schmidlapp*, 315 U. S. 657, 86 L. Ed. 1097; *Bullen v. Wisconsin*, 240 U. S. 625, 60 L. Ed. 830.

The logic of the foregoing analysis is strongly buttressed in the instant case by the fact that the settlor chose, after she had come to Florida, which was to be her last domicile, to make an integrated pattern of arrangements for the disposition of her property. At this period of her life she desired to make final exercise of whatever powers she might have had under the earlier arrangement but was careful to provide in her will for the possible ineffectiveness of such exercise of power, making an unquestionably valid testamentary disposition to settle her entire estate if the doubtful powers of appointment failed.

Having decided that Florida law applies, we are next obliged to apply it. The validity of an attempted ~~inter vivos~~ trust such as this is a ~~matter of first impression~~ in this state. The trust instrument provided, as we have seen, that the settlor would receive all of the net income for life. The settlor reserved to herself the right to amend or revoke the trust agreement in whole or in part at any time. Many powers of the trustee could ordinarily be exercised by it only upon the written direction of, or with the written consent of, the "adviser" of the trust. These powers were the following:

"(b) To sell at public or private sale, exchange for like or unlike property, convey, lease for terms longer or shorter than the trust, and otherwise dispose of any or all property, real or personal, held in the trust fund, for such price and upon such terms and credits as Trustee may deem proper.

"(c) To invest the proceeds of any such sale or sales, and any other money available for investment, in such stocks, bonds, notes, securities and/or other income producing property as may be deemed appropriate for this trust fund, irrespective of the rules of investment applying to trustees under any present or future laws of the State of Delaware or elsewhere.

* * *

"(e) To participate in any plan or proceeding for protecting or enforcing any right, obligation or interest arising from any stock, bond, note or security held in the trust fund, or for reorganizing, consolidating, merging or adjusting the finances of any corporation issuing the same, to accept in lieu thereof any new or substituted stocks, bonds and/or securities, to pay any assessment or any expense incident thereto, and to do any other act or thing that Trustee may deem necessary or advisable in connection therewith."

As "advisor" the settlor named her husband or "such other person or persons as trustor may nominate in writing delivered to trustee during her lifetime". Finally, and very significantly, the settlor reserved to herself the power of appointment, which we have discussed above, with a view to naming beneficiaries to take remainder interests in the trust after her death.

Although any of these reservations of power in the settlor, standing alone, might not have been enough to render the trust invalid (cf. *Williams v. Collier*, 120 Fla. 248, 162 So. 868, wherein we upheld a revocable trust reserving a life interest to the settlor, with remainder payable to named grandchildren) the cumulative effect of the reservations was such that the relationship established divested the settlor of virtually none of her day-to-day control over the property or the power to dispose of it on her death, and the trust was illusory. See *Burns v. Turnbull*, 294 N. Y. 889, 62 N. E. 2d 785; *In re Tunnell's Estate*, 325 Pa. 554, 190 A. 906; *In re Shapley*, 353 Pa. 499, 46 A. 2d 227; *Hurley's Estate*, 17 Pa. D. & C. 637; *Warsco v. Oshkosh Savings & Trust Co.*, 183 Wis. 156, 196 N. W. 829; *Steinke v. Sztanka*, 364 Ill. 334, 4 N. E. 2d 472. In Scott, Trusts and the Statute of Wills, 43 Harv. L. R. 521, 529, the author states:

"Suppose that the settlor reserves not merely a life interest and a power to revoke the trust in whole or in part and to modify the trust, but reserves also a power to control the trustee in the administration of the trust. In such a case, there is authority to the effect that the trust is in substance testamentary and is invalid unless declared in an instrument executed in accordance with the requirements of the Statute of Wills."

Another common principle is reflected in Restatement of Trusts, Sec. 56, which reads as follows:

"Where the owner of property purports to create a trust inter vivos but no interest passes to the bene-

ficiary before the death of the settlor, the intended trust is a testamentary trust and is invalid unless the requirements of the statutes relating to the validity of wills are complied with."

Appellants contend that Illustration 8 under Subsection g. of this section is "exactly our case". This illustration reads as follows:

"8. A transfers certain securities to B in trust to pay the income to A for life and upon A's death to convey the securities to such person as may be designated in a letter to be delivered by A to B on the following day. On the following day A delivers a letter to B designating C as the person entitled to receive the securities on A's death. A valid trust for C is created, since an interest passes to C during the life of A."

The above illustration represents the instant trust in some particulars, but is an oversimplification of the facts before us. It relates to a single exercise of a power of appointment, rather than frequently revoked and amended exercises of power, such as appear in the case before us, which would demonstrate that the settlor considered the appointments to be ambulatory in nature and exactly like successive wills or codicils in their operation. The illustration given, moreover, does not consider the element of control, which we have discussed above. This is treated in Sec. 57 of the Restatement, Subsection g. of which reads in part as follows:

"If the settlor reserves a beneficial life estate and power to revoke or modify the trust and such power to control the trustee as to the details of the administration of the trust that the trustee is his agent, the intended disposition so far as it is intended to take effect after his death is invalid unless the requirements of the Statute of Wills are complied with, but the intended trust is valid so far as the beneficial life estate of the settlor is concerned."

Illustration 5 reads as follows:

"5. A, the owner of shares of stock, delivers the certificates to the B Trust Company to hold and deal with as custodian, to receive the income and pay it over to A, and with power to sell the shares and to reinvest the proceeds. In order to carry out these purposes the shares are registered in the name of the trust company. A writes a letter to the trust company directing it to convey the shares on A's death to C, unless A should otherwise direct. A dies. The intended disposition in favor of C is testamentary, and C is not entitled to the shares unless the requirements of the Statute of Wills are complied with."

True it is that in the situation posed in Illustration 5 the action taken by A, the settlor, is somewhat less formal than the action taken by the settlor herein, and while this is a circumstance which would tend to uphold the validity of the instant trust, we do not consider it controlling when weighed against the multiple reservations of power we have discussed.

We reemphasize that we do not, and need not, hold that the reservation of the power of appointment, or any other factor standing alone, would suffice to invalidate the remainder interests sought to be created under this trust. It is enough to observe that if, as to the remaindermen, this trust is not invalid as an agency agreement, and testamentary as the court below found, it is difficult to understand what further control could be retained by a settlor to produce this result, and the principles to which we have alluded above would lose their meaning. We have been shown no error in the chancellor's ruling on this aspect of the case, which accordingly must be affirmed.

We next consider the contention made on the cross-appeal that the chancellor erred in ruling that he lacked jurisdiction over the persons of certain absent defendants, summoned to appear by constructive service of process.

These defendants were the trustee and persons who would benefit under the last power of appointment executed under the trust, and against the will. In *Henderson v. Usher*, supra, 160 So. 9, we upheld constructive service of a citizen of New York, although the trust "res", consisting entirely of intangible personalty, was physically located in New York, and the trust was administered there by the Chase National Bank of New York, as trustee. We held that constructive service was valid in that state of the record because substantive jurisdiction existed in the Florida court by virtue of construction of a will, which was also involved, the testator having been domiciled in Florida. We observed that it was not essential that the assets of the trust be physically in this state in order that constructive service be binding upon a non-resident where the problem presented to the court was to adjudicate, inter alia, the status of the securities incorporated in the trust estate and the rights of the non-resident therein. It is entirely consistent with the *Henderson* case to hold, as we do, that the court below erred in ruling that it lacked jurisdiction over the persons of the absent defendants. With this view of the case, we need not consider the contention of cross-appellees that the absent defendants are necessary parties under *Martinez v. Balbin*, Fla., 76 So. 2d 488.

Finally, we mention again the motion to remand on the basis of the decree of the Delaware court. Since we hold that we have jurisdiction of the matter presented, and that Florida law is exclusively applicable thereto, this motion must be denied.

Affirmed in part; reversed in part.

TERRELL, Acting Chief Justice, THORNAL and O'CONNELL, JJ., concur.

IN THE SUPREME COURT OF FLORIDA:

I, GUYTE P. McCORD, Clerk of the Supreme Court of Florida, do hereby certify that the above attached and twelve foregoing pages is a true and correct copy of the Opinion and Judgment of the Supreme Court of Florida in that certain cause recently pending in said Court wherein Elizabeth Donner Hanson, individually and as executrix, et al., were appellants, and Katherine N. R. Denckla, individually, et al., were appellees, which was filed in said Court on September 19th, 1956, all as the same appears among the records and files of my said office. This Opinion and Judgment will not become final until after fifteen days from the date of filing said Opinion as aforesaid and if a petition for rehearing is filed within said fifteen-day period it will not become final until the petition for rehearing is acted on and disposed of. .

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the Seal of the Supreme Court of Florida, at Tallahassee, the capital, on this the 21st day of September, A. D. 1956.

GUYTE P. McCORD,
*Clerk of the Supreme Court
of Florida.*

IN THE SUPREME COURT OF FLORIDA.

June Term, A. D. 1956.

Wednesday, November 28, 1956.

ELIZABETH DONNER HANSON, INDIVIDUALLY AND AS
EXECUTRIX, ET AL.,

Appellants,

v.

KATHERINE N. R. DENCKLA, INDIVIDUALLY, ET AL.,

Appellees.

ORDER.

The petition for rehearing filed by the appellants in the above cause has been considered and said petition is denied.

A True Copy

Test:

/s/ GUYTE P. McCORD,

Clerk Supreme Court. (Seal)

IN THE SUPREME COURT OF THE STATE OF DELAWARE.

No. 8, 1936.

DORA STEWART LEWIS, MARY WASHINGTON STEWART BORIE
and PAULA BROWNING DENCKLA,

Defendants Below, Appellants,

v.

ELIZABETH DONNER HANSON, as Executrix and Trustee under the Last Will of Dora Browning Donner, deceased,
Plaintiff Below, Appellee,

WILMINGTON TRUST COMPANY, a Delaware corporation, as Trustee under three separate Agreements, (1) and (2) with William H. Donner dated March 18, 1932 and March 19, 1932, and (3) with Dora Browning Donner dated March 25, 1935,

Defendant Below, Appellee,

DELAWARE TRUST COMPANY, a Delaware corporation, as Trustee under three separate Agreements (1) with William H. Donner dated August 6, 1940, and (2) and (3) with Elizabeth Donner Hanson, both dated November 26, 1948,

Defendant Below, Appellee,

KATHERINE N. R. DENCKLA,

Defendant Below, Appellee,

ROBERT B. WALLS, ESQUIRE, Guardian ad litem for Dorothy B. R. Stewart and William Donner Denckla,

Defendant Below, Appellee,

ELWYN L. MIDDLETON, Guardian of the property of Dorothy B. R. STEWART, a mentally ill person,

Defendant Below, Appellee,

EDWIN D. STEEL, JR., ESQUIRE, Guardian *ad litem* for Joseph Donner Winsor, Curtin Winsor, Jr., and Donner Hanson,

Defendant Below, Appellee,

BRUN MAWR HOSPITAL, a Pennsylvania corporation, MIRIAM V. MOYER, JAMES SMITH, WALTER HAMILTON, DOROTHY A. DOYLE, RUTH BRENNER and MARY GLACKENS,

Defendants Below, Appellees,

LOUISVILLE TRUST COMPANY, a Kentucky corporation, as Trustee for Benedict H. Hanson, and as Trustee under agreements with William H. Donner,

Defendant Below, Appellee,

WILLIAM DONNER ROOSEVELT, JOHN STEWART and BENEDICT H. HANSON,

Defendant Below, Appellee,

OPINION.

(January 14, 1957)

WOLCOTT and BRAMHALL, *Justices*, and CAREY, *Judge*, sitting.

Appeal from a judgment of the Court of Chancery of New Castle County.

Arthur G. Logan and Aubrey B. Laak, of Wilmington, for appellants.

Robert B. Walls, Jr., Guardian *ad litem* for Dorothy B. R. Stewart and William Donner Denckla, appellee *pro se*.

Caleb S. Layton, of Wilmington, for Wilmington Trust Company, appellee.

David F. Anderson, of Wilmington, for Delaware Trust Company, appellee.

Edwin D. Steel, Jr., Guardian *ad litem* for Joseph Donner Winsor, Curtin Winsor, Jr., and Donner Hanson, appellee *pro se*.

WOLCOTT, J.:

This appeal involves two fundamental questions: (1) Whether a purported *inter vivos* trust and the exercise of a power of appointment under it are valid or invalid; and (2) Whether the parties may litigate the question of validity in a Delaware court because of an adverse adjudication upon the point by a Florida court.

The action below, commenced by Elizabeth Donner Hanson¹ as the Florida executrix of the settlor's will and, also, in her capacity as trustee under the residuary clause of that will, seeks a declaratory judgment establishing the persons entitled to \$417,000 which was distributed by the *inter vivos* trustee pursuant to the exercise of the power of appointment.

The parties named as defendants in the action include Wilmington Trust Company, trustee under the trust agreement in question and, as such, the distributor of the \$417,000, Delaware Trust Company, trustee, the recipient of \$400,000 of the trust assets, the recipients of the balance of \$17,000, and all possible claimants of the trust corpus, either under the exercise of the power of appointment or under the settlor's Florida will.

The cause came up for decision below on four cross-motions for summary judgment. It will suffice to state that the defendants divide themselves into two contending groups. One group, which we will call the "Lewis Group", maintains that the trust agreement is invalid as an *inter vivos* trust instrument and that, accordingly, the exercise of the power of appointment was testamentary in character and, as such, ineffective under Florida law to pass any interest. The Lewis Group contends that the entire trust corpus comprises part of the Florida estate of the settlor and passes under her will.

1. Since its institution, she has been enjoined by the Florida court from prosecuting the action. Since that time, neither she nor her counsel has taken any part in the litigation.

The second group, which we will call the "Hanson Group" maintains that the trust agreement is valid and that, accordingly, the transfer of \$417,000 pursuant to the exercise of the appointment is legally sufficient to pass title. Needless to say, the adoption of the contention of one group will benefit it financially to the loss of the other.

The Acting Vice Chancellor granted summary judgment in favor of the Hanson Group, holding that the trust agreement was a valid *inter vivos* trust; that the exercise of the power of appointment was effective to pass title to the \$417,000, and that there was no estoppel resulting from the Florida judgment. From this decision the Lewis Group appeals.

The facts are not in dispute. On March 25, 1935, Dora Browning Donner (hereafter Mrs. Donner), then being a resident of Pennsylvania, entered into a trust agreement with Wilmington Trust Company and deposited certain securities with it as the trust corpus. By the terms of the agreement Wilmington Trust Company was directed to manage, invest and reinvest the trust corpus and to pay over the net income to Mrs. Donner for her life who reserved to herself a power of appointment of the corpus exercisable either by instrument or by will. Failing the exercise of the power, the agreement directed that the trust corpus be distributed by the trustee at her death to her issue surviving, or to her next of kin.

Specific powers were conferred upon Wilmington Trust Company, as trustee, which in substance were the ordinary powers granted to a trustee. However, it was specified that Wilmington Trust Company could exercise certain of the powers "only upon the written direction of, or with the written consent" of a trust advisor. These powers were (1) to sell trust assets, (2) to invest proceeds of sale of trust property, and (3) to participate in mergers and reorganizations of corporations whose securities were held as part of the trust assets.

In the agreement, Mrs. Donner designated a trust advisor and reserved the right to nominate other advisors at any time during her lifetime. She also reserved the right to amend, alter or revoke the agreement in whole or in part at any time, as well as the right to change from time to time the trustee. On one occasion, she withdrew \$75,000 from the trust corpus, which sum she later replaced.

On two different occasions prior to 1949, Mrs. Donner executed instruments exercising the power of appointment. Finally, on December 3, 1949,² by a non-testamentary instrument, she exercised the power of appointment, specifically revoking the earlier exercises by her of the power, and directing the Wilmington Trust Company, six months after her death, to pay over a total of \$17,000 to Bryn Mawr Hospital and certain family retainers, \$200,000 to Delaware Trust Company in trust for Joseph Donner Winsor, \$200,000 to Delaware Trust Company in trust for Donner Hanson, and the residue of the corpus to the executrix of her will.

In 1944, Mrs. Donner changed her residence from Pennsylvania to Palm Beach County, Florida where she was domiciled at her death in 1952. Her will was probated in Florida and Elizabeth Donner Hanson duly qualified as executrix. The residuary clause of her will directed her executrix to pay from the residuary estate, which specifically included the balance of the trust corpus not appointed in her lifetime, all death taxes on property appointed from the trust corpus during her lifetime, and to divide the balance remaining into two equal parts, one part to be transferred to Delaware Trust Company in trust for Katherine N. R. Denekla, a daughter; and the other part to be transferred to Elizabeth Donner Hanson in trust for Dorothy B. R. Stewart, another daughter, for her life, and upon her death to Delaware Trust Company in trust for Katherine Denekla.

2. Later amended in a minor aspect.

At the death of Mrs. Donner the trust corpus held by Wilmington Trust Company amounted to in excess of \$1,490,000. Thereafter, pursuant to the directions contained in the exercise of the power of appointment Wilmington Trust Company distributed assets in the aggregate amount of \$417,000 and transferred a portion of the balance of the corpus to the executrix of the will of Mrs. Donner.

In January, 1954 the two residuary beneficiaries under the will of Mrs. Donner³ brought an action for declaratory judgment in Palm Beach County, Florida against Mrs. Hanson, individually and as executrix, Wilmington Trust Company, Delaware Trust Company, and some of the other possible claimants to the assets passing under the residuary clause of the will of Mrs. Donner.⁴ In this action a judgment was sought determining what property passed under the will of Mrs. Donner, and the authority of the executrix over the assets held by Wilmington Trust Company under the 1935 agreement.

Neither Wilmington Trust Company nor Delaware Trust Company were served personally in the Florida action, nor did either of them appear. None of the trust assets held by Wilmington Trust Company has ever been held or administered in Florida, nor has Wilmington Trust Company ever done business in the State of Florida.

On January 14, 1955 the Circuit Court of Palm Beach County, Florida entered a decree⁵ holding that it lacked jurisdiction over the trust assets in Delaware and over Wilmington Trust Company, Delaware Trust Company and the other non-answering defendants, and directed that the complaint be dismissed without prejudice as to all of them. It was also held that no present interest passed to any

3. Katherine Denckla appeared in her own person. Dorothy Stewart appeared by a guardian.

4. Some of the family retainers, the recipients of a total of \$3,000 from the distribution pursuant to the exercise of the power of appointment, were not named as parties.

5. The Florida decree was entered after the instituting of suit in Delaware by the executrix.

beneficiary other than Mrs. Donner under the agreement of 1935 and that the exercise of the power of appointment by her was testamentary in character and, as such, invalid under Florida law because it was not subscribed by two witnesses. It was held, therefore, that the assets held by Wilmington Trust Company passed under the will of Mrs. Donner, and that the distribution thereof was to be made in accordance with the residuary clause.

Thereafter, an appeal was taken to the Supreme Court of Florida by the equivalent of the Hanson Group seeking a reversal of the holding of invalidity of the 1935 trust and the exercise of the power of appointment. Similarly, the equivalent of the Lewis Group by cross-appeal sought a reversal of the holding of lack of jurisdiction over Wilmington Trust Company and Delaware Trust Company.

The Supreme Court of Florida handed down its opinion (not yet reported) affirming that portion of the decree adjudging the invalidity of the trust and the exercise of the power of appointment, and reversing that portion of the decree holding that Florida had no jurisdiction over Wilmington Trust Company and Delaware Trust Company.

In the interim, while the appeal was pending in Florida, the Lewis Group perfected its appeal in this court from the judgment of the Acting Vice Chancellor and argued it before us.

In the argument and on the briefs, the main emphasis was placed by the Lewis Group upon the estopping effect of the Florida judgment. In deciding this appeal, however, we think a more logical approach to what has now become a headlong jurisdictional collision between states is to consider first the question of what law governs the basic validity of the trust agreement and the exercise of the power of appointment, and whether or not under the applicable law the instruments are legally effective as such. We therefore take up first the question of essential validity of the trust and the exercise of the power of appointment.

There is no dispute concerning the pertinent facts, Wilmington Trust Company at all times has done business in Delaware. The trust agreement was executed in Delaware. The assets comprising the trust corpus were delivered to Wilmington Trust Company and retained by it in Delaware. The trust was administered wholly within Delaware. At the time the agreement was executed, Mrs. Donner was a resident of Pennsylvania.

In determining the situs of a trust for the purpose of deciding what law is applicable to determine its validity, the most important facts to be considered are the intention of the creator of the trust, the domicile of the trustee, and the place in which the trust is administered. *Wilmington Trust Co. v. Wilmington Trust Co.*, 26 Del. Ch. 396, 24 A. 2d 309; *Wilmington Trust Co. v. Sloane*, 30 Del. Ch. 103, 54 A. 2d 544; *Annotation* 89 A. L. R. 1033.

Generally speaking, a creator of an *inter vivos* trust has some right of choice in the selection of the jurisdiction, the law of which will govern the administration of the trust. *Wilmington Trust Co. v. Wilmington Trust Co.*, supra. This trust agreement was signed and the securities delivered to a trustee doing business in Delaware. We think that this circumstance clearly indicates the intent of Mrs. Donner to have the trust administered and governed according to the law of Delaware. 1 *Beale, The Conflict of Laws*, 599.

Formerly, some courts emphasized the domicile of the settlor in deciding what law governed, but the more recent trend of decisions has placed considerably more emphasis on the location of the trust property and its place of administration. *Land, Trust in the Conflict of Laws*, § 23; 1A *Bogert, Trusts and Trustees*, § 211, p. 327; *Restatement, Conflict of Laws*, § 294(2). The manifest intention of Mrs. Donner to create a Delaware trust with a Delaware trustee, the deposit of the trust assets in Delaware, and the administration of the trust in Delaware, make it clear that the

situs of the trust created by the agreement of 1935 is Delaware, and that, therefore, its law determines its validity.

Not only is it the rule that the essential validity of an *inter vivos* trust having its situs in Delaware is governed by its law, but it is equally the rule that the validity of the exercise of a power of appointment reserved in such a trust agreement is to be determined in accordance with Delaware law. *Wilmington Trust Co. v. Wilmington Trust Co.*, supra; *Equitable Trust Co. v. Snader*, 17 Del. Ch. 203, 151 A. 712; *Land, Trusts in the Conflict of Laws*, § 24. This is so because the appointments made by the exercise of the power are regarded in law as though they had been embodied in the original trust instrument, and as such as having been created by it. *Wilmington Trust Co. v. Wilmington Trust Co.*, supra.

We, therefore, hold that the law of Delaware determines the essential validity of this trust agreement and of the exercise of the power of appointment.

We now reach the question of whether or not this particular trust instrument and the exercise of the power reserved in it are valid under Delaware law.

The Lewis Group first argues that the agreement of 1935 created no present interest in remainder, either vested or contingent, in anyone prior to the death of Mrs. Donner, and that, therefore, it was a testamentary disposition and, as such, invalid for failure to comply with the Florida statutes concerning wills. In support of the argument are cited 3 *Scott on Trusts*, § 330.4; 1 *Bogert on Trusts and Trustees*, § 103; and *Restatement, Trusts*, § 56. We recognize the rule but we think that it does not apply to the trust created by Mrs. Donner in 1935.

By that agreement Mrs. Donner reserved a life interest to herself, and directed that upon her death the corpus should be distributed as directly by the exercise of a reserved power of appointment. In the event she should die without having exercised the power it was directed that the

corpus should be distributed to her then living issue, *per stirpes*, and in default of living issue, to her next of kin.

We think that a present interest in remainder came into existence with the creation of the trust in 1935. That remainder interest was lodged in Mrs. Donner's issue upon condition they survived her. By the same token, Mrs. Donner's next of kin had an interest in remainder conditioned upon Mrs. Donner dying without leaving surviving issue. It is true that both of these remainder interests—whether vested or contingent makes no difference—were subject to defeasance by the exercise of the reserved power of appointment. That, however, does not mean that they were not present interests created in 1935. *Gray, The Rule Against Perpetuities*, (4th Ed.), § 112(3); *Restatement, Property, Future Interests*, § 157, comment R. Furthermore, the exercise of the power of appointment by Mrs. Donner by instrument in her lifetime created present interests in the beneficiaries of the appointment, and under the rule of *Wilmington Trust Co. v. Wilmington Trust Co.*, *supra*, these interests are regarded in law as having been embodied in the agreement of 1935. Accordingly, we are of the opinion that the trust is not testamentary in character for failure to create present interests in persons other than the settlor at the time it was created.

The Lewis Group next points to certain provisions of the trust agreement and contends that the effect of them is to destroy it as an effective *inter vivos* deed of trust. These provisions are: (1) The reservation by Mrs. Donner of all of the net income from the trust for her life; (2) The reservation by Mrs. Donner of the right to amend or revoke the trust agreement in whole or in part; (3) The reservation by Mrs. Donner of the right to change the trustee under the trust; (4) The reservation by Mrs. Donner of the right to designate and to change an investment advisor to the trustee; (5) The limitation placed upon the trustee to the effect that certain powers could be exercised only with the consent

of or at the direction of the trust advisor, and (6) The reservation by Mrs. Donner of the power to appoint the trust corpus either by *inter vivos* instrument in writing, or by last will and testament.

The Lewis Group contends that cumulatively the above recited provisions have the legal effect of creating an agency relationship between Mrs. Donner and Wilmington Trust Company. It is, therefore, argued that since the relationship was one of agency, the disposition of the trust corpus by Mrs. Donner through the purported exercise of her reserved power of appointment was testamentary in character, and, as such, invalid under the law of Florida in which state she had died domiciled.

The Lewis Group cites authorities to the effect that if a settlor retains large powers of control over trust property and a power to change the ultimate beneficiaries of the trust to such an extent that the trust is made as ambulatory as a will, under some circumstances it will not be sustained as a trust, upon the theory that it is a disguised attempt by the settlor to make a revocable disposition of property to take effect after death. The question comes down to whether or not the combined effect of the reserved powers is such as to leave the settlor virtually the owner of the property and the trustee a mere agent. See *Annotation*, 32 ALR(2) 1270.

In Delaware it has long been the law that the reservation of a life interest in trust income coupled with a power to revoke the trust and to dispose of the trust corpus by testamentary appointment, will not make the trust testamentary in character. *Equitable Trust v. Paschall*, 13 Del. Ch. 87, 115 A. 356. Nor will the reservation of a power to change the trustee at the option of the settlor make it testamentary. *Wilmington Trust Co. v. Wilmington Trust Co.*, *supra*.⁶

6. This also seems to be the law in most jurisdictions. *United Bldg. & Loan Assn. v. Garrett*, (1946, D. C. Ark.) 64 F. Supp. 460; *Rose v. Rose*, 300 Mich. 73, 1 N. W. 2d 458; *Cleveland Tr. Co. v.*

However, the main thrust of the argument of the Lewis Group is directed to the provisions of the agreement providing for the designation of a trust advisor and the limitations on the power of the trustee to act only with the consent of or at the direction of the advisor.

By agreement, Mrs. Donner reserved the right to change the original advisor named and, in fact, she did so on two separate occasions. The agreement, however, specifically confines the powers of the trust advisor as limitations on the exercise of the trustee's powers to (1) the power to sell trust property; (2) the power to invest the proceeds of any sale of trust property, and (3) the power to participate in any plan of merger or reorganization of any company in which trust proceeds have been invested. With respect to the exercise of all of the other specific powers granted to the trustee the consent of the trust advisor is not required.

If it be assumed that the exercise by the trustee of the above enumerated powers had been conditioned solely upon the consent of Mrs. Donner herself, it is clear that that limitation would not have made the trust testamentary in character. *Restatement of Trusts*, § 57, Comment g; 1 *Scott on Trusts*, § 57.2; 1 *Bogert on Trusts and Trustees*, § 104; *National Shawmut Bank of Boston v. Joy*, 315 Mass. 457, 53 N. E. 2d 113. It follows logically, therefore, that if Mrs. Donner could have limited the power of the trustee to act only with her consent without making the trust testamentary, the same limitation, could have been imposed by requiring the consent of a third party. In point of fact, the *National Shawmut Bank* case was precisely that situation, the power to control the investing of the trust funds

White, 134 Ohio State 1, 15 N. E. 2d 627, 118 ALR 475; *Pickney v. City Bank Farmers Trust Co.*, 292 N. Y. S. 835; *Strause v. First Nat'l Bank of Ky.*, (Ky.) 245 S. W. 2d 914, 32 ALR 2d 125; *Leahy v. Old Colony Tr. Co.*, 326 Mass. 49, 93 N. E. 2d 238, 18 ALR 2d 1006; *City Bank Farmers Tr. Co. v. Charity Organization Society*, 265 N. Y. S. 267; *Farkas v. Williams*, 5 Ill. 2d 417, 125 N. E. 2d 600; See 1 *Scott on Trusts*, § 57.1.

having been conferred upon a third person. Furthermore, a trust advisor is a fiduciary, somewhat in the nature of a co-trustee, and is sometimes described as a quasi-trustee. *Gathright v. Gaut*, 276 Ky. 562, 124 S. W. 2d 782; *Restatement of Trusts*, § 185, Comment c; 2 *Scott on Trusts*, § 185. The resulting situation fundamentally is not unlike the appointment of co-trustees whose joint action is required in trust matters.

The agreement of 1935 by its terms reserves no power to Mrs. Donner herself over the control or management of the trust property, except such power as may come from her right to revoke the trust, change the trustee and change the advisor to the trustee. As far as the terms of the agreement itself are concerned, the trustee and the advisor were required to use their independent judgment in reaching decisions relating to the administration of the trust.

The terms of the agreement, therefore, do not compel the conclusion that Mrs. Donner retained such a measure of control over the management of the trust property that, as a matter of law, the Wilmington Trust Company and the trust advisor named were actually her agents. The entire management of the trust is vested by the terms of the instrument in the trustee and the advisor. We think, therefore, that under the law of Delaware the agreement of 1935 created a valid *inter vivos* trust and not an agency relationship as the Lewis Group contends.

The Lewis Group, however, urges that the history of operation of the trust by Wilmington Trust Company indicates clearly that Wilmington Trust Company was in fact a mere agent. To support this contention, affidavits and depositions were filed upon the theory that the agreement, itself, was ambiguous, and that the history of operation of the trust would be of assistance in resolving the ambiguity.

Such extrinsic evidence is material only in the event of ambiguity in the trust instrument itself. *Restatement of Trusts*, § 38. In our opinion, there is no ambiguity in this agreement. On the contrary, we think its provisions

are clear with respect to the acts of Wilmington Trust Company which required the consent of the trust advisor. The scheme used in drafting the agreement was to enumerate specific powers granted to Wilmington Trust Company, as trustee. It was then specifically directed that certain, but not all, of those powers should be exercised by Wilmington Trust Company only with the consent of or at the direction of the advisor of the trust. We think there is nothing ambiguous in this provision and that the requirement of consent of the trust advisor is confined to those specific powers. Consequently, we agree with the Acting Vice Chancellor that the evidence of the history of the trust administration is irrelevant.

In view, however, of the insistence of counsel upon the point, we will consider it, but we point out that in our opinion such consideration is unnecessary, and probably improper in the absence of an ambiguity in the instrument.

Generally speaking, the evidence discloses that Mrs. Donner named successively three different trust advisors, and that in administering the trust Wilmington Trust Company acted almost entirely in accordance with the directions of the trust advisor. We will assume, as they appear to do, that the affidavits support the contention of the Lewis Group that Wilmington Trust Company in all details of trust administration accepted unhesitatingly the directions of the advisor, and in fact exercised no independent judgment.

We have no doubt, however, that the voluntary giving up by a trustee of its independent functions as trustee to an advisor named in the trust instrument cannot operate to change the fundamental nature of the relationship created by the agreement. Such a voluntary failure to act as an independent trustee in those fields in which the agreement contemplated such action may be ground at the insistence of a beneficiary to remove the trustee but, certainly, it cannot change the relationship intended to be created by the trustor.

• We note, also, that none of the facts supports at all the contention that Mrs. Donner, herself, had a hand in the management of the trust or made any of the decisions with respect to the internal management of the trust. Indeed, as far as the facts indicate, she knew nothing of the manner in which Wilmington Trust Company and the trust advisor were managing the affairs of the trust.

Assuming, therefore, that the evidence was material, a conclusion we expressly disclaim, nevertheless, there is no showing that Mrs. Donner retained any practical control of the management of the trust estate to the extent that the trustee and the trust advisor were thereby created her agents, with the consequence that, in law, the agreement of 1935 and the exercise of the power of appointment created by it were testamentary in character.

Our conclusion, therefore, is that the agreement of 1935 under the law of Delaware created a valid *inter vivos* trust. Under the law of Delaware, also, we think Wilmington Trust Company was required to transfer the trust assets pursuant to the directions contained in Mrs. Donner's exercise of the power of appointment delivered to it prior to her death.

The Lewis Group cites principally in support of its argument in this respect *In re Pengelly's Estate*, 374 Pa. 358, 97 A. 2d 844. The case, however, is of little aid to them. It was a suit brought by a widow, estranged from her husband for over forty years, to set aside a purported *inter vivos* trust which excluded her from any share in the husband's assets. The purported trust agreement transferred certain securities in trust and granted the trustee the right to invest trust assets "with the approval of the settlor during his lifetime." By the agreement the settlor reserved the income for life, and disposed of the corpus after his death in a manner to exclude his widow.

The court, in its opinion, states the fact to be that the trust agreement was in effect nothing more than the continu-

ance of an arrangement for the management of the settlor's affairs existing between the trustee and the settlor for a period of seven years prior to the execution of the agreement, and that that arrangement was one of principal and agent. Thus, *Pengelly's Estate* dealt with a purported trust which in reality perpetuated a previously existing principal and agent relationship. This relationship was unchanged and continued to be completely subjected to the actual directions of the settlor in its administration. As we have pointed out, in the case before us, however, Mrs. Donner exercised no actual control whatsoever. The two cases are clearly different.

We have been furnished a certified copy of the opinion of the Supreme Court of Florida in the litigation between some of the parties to this appeal. Later, we will have occasion to refer to this opinion under the point of collateral estoppel, but in connection with the question now under discussion we regard it merely as an additional authority cited by the Lewis Group.

The Florida Supreme Court held that the law of Florida governed the question of validity of the exercise of the power of appointment, because Mrs. Donner was domiciled in Florida at the time of her death. As we have pointed out, however, the domicile of a settlor is at most a minor factor to be considered in determining the situs of an *inter vivos* trust. As we read the opinion it appears to be the theory of the Florida Court that each exercise of the power of appointment was an amendment and republication of the agreement of 1935, and since no present remainder interest was created either by the agreement, or the exercise of the power, until the death of Mrs. Donner domiciled in Florida, the validity of those remainder interests was to be tested by Florida law.

With all deference to the highest tribunal of a sister state, we disagree. Such may be the law of Florida but it is certainly not the law of Delaware. As we have pointed

out, the exercise of a power of appointment creates immediate interests which in law are as though they had been written into the original instrument. The right to revoke or change the appointment has merely the effect of making the interests thereby created subject to possible defeasance. Furthermore, we think the Florida Supreme Court, in concluding that no present interests in remainder were created by the agreement of 1935, has overlooked, presumably inadvertently, the gift in remainder to Mrs. Donner's living issue, or next of kin, in default of exercise of the power.

We are also constrained to disagree with the conclusion of the Florida Supreme Court that the agreement of 1935 created an agency relationship. The decision in this respect is based, apparently, solely upon the provisions of the agreement, itself, reserving certain powers to Mrs. Donner and requiring in some instances joint action by the trustee and the advisor. As we have pointed out, the reservation of a power to revoke or appoint the corpus of an *inter vivos* trust does not transform the relationship into one of agency. Nor is there anything in the provisions relating to the trust advisor which suggests that the advisor was subject to the dictates of Mrs. Donner. Even the facts concerning the operation of the trust, which we suspect were not before the Florida court, rebut the violent presumption necessary to be made to support the conclusion reached. The opinion of the Florida Supreme Court is not persuasive as an authority.

We think our discussion of the validity of the agreement as an *inter vivos* trust is sufficient answer to other authorities relied upon by the Lewis Group in support of its contentions under this point.

The second fundamental question is what effect, if any, does the adverse judgment entered in the Florida litigation have upon the right of the Hanson Group to litigate the question of essential validity of the trust of 1935 in Delaware.

The Florida judgment⁷ is an adjudication that by reason of the probate of Mrs. Donner's will, Florida, as the state of domiciliary administration, has substantive jurisdiction to inquire into the validity of the 1935 trust and the exercise of the powers of appointment, references to which were made in the will, and to hold them invalid under Florida law. Upon this point, the Supreme Court of Florida affirmed the trial court's ruling of invalidity. In the cross appeal, which sought a review of the trial court's holding that Florida lacked jurisdiction over the non-appearing defendants (among which were Wilmington Trust Company, Delaware Trust Company),⁸ the Florida Supreme Court reversed the trial court and held that jurisdiction over the trustee under the trust and the beneficiaries of the exercise of the power of appointment could be obtained by constructive service.

In their answer the Lewis Group pleads the Florida judgment and upon the basis of it asks for certain relief. The first prayer for relief is that Delaware Trust Company be ordered to account for the \$400,000 received by it from the trustee and be directed to transfer it to the executrix of Mrs. Donner's will. The second prayer for relief is, in the event Delaware Trust Company not be ordered to account, that a money judgment be entered against Wilmington Trust Company in the amount of \$417,000 with interest.

With respect to ~~the second~~ prayer for relief, it is obvious that, irrespective of the demand that Delaware Trust Company be ordered to account, the Lewis Group seeks a personal judgment against Wilmington Trust Company from the inclusion in the prayer for a judgment of \$17,000, since Delaware Trust Company has never received this sum.

7. By stipulation of the parties the record has been augmented to include the Florida judgment as finally framed by the Supreme Court of Florida, to all intents and purposes as though it had been pleaded and proven in the court below.

8. The recipients of \$3,000 of the \$17,000 appointment were not even named as parties *pro forma* in the Florida action.

The Lewis Group, therefore, seeks to use the Florida judgment as the basis for an assertion of personal liability against Wilmington Trust Company, and as a judgment *in rem* dispositive of the entire trust corpus. The full faith and credit clause of Article IV of the Federal Constitution is invoked.

The demand of full faith and credit for the Florida judgment as the prop for the assertion of personal liability against Wilmington Trust Company is defeated by the fact that Wilmington Trust Company has never been served personally with Florida process, nor has it appeared in any form in the Florida litigation. The recital of these facts is sufficient to require the denial of full faith and credit to the Florida judgment when it is sought to be made the basis for the assertion of personal liability. *Iowa-Wisconsin Bridge Co. v. Phoenix Corp.*, 2 Terry 527; 25 A. 2d 383, cert. den. 317 U. S. 671. It follows, therefore, that the prayer of the Lewis Group for a money judgment against Wilmington Trust Company was properly denied.

Next, the Lewis Group argues that the Florida judgment is entitled to full faith and credit as a judgment *in rem*. It is, of course, true that the courts of Florida may adjudicate with respect to a *res* within its boundaries and subject to its control, and full faith and credit may be successfully claimed for such a judgment in the courts of other states. *Restatement, Conflict of Laws*, § 429. But a judgment which has the force of a judgment *in rem* with respect to assets located in Florida does not acquire by reason of the full faith and credit clause any extra-territorial effect upon assets located outside of the State of Florida in the absence of seizure by the Florida courts. *Riley v. New York Trust Co.*, 315 U. S. 343, 62 S. Ct. 609. To have any extra-territorial effect such a judgment must have been rendered after the acquisition of personal jurisdiction over the party claiming the non-Florida assets. *Baker v. Baker, Eccles & Co.*, 242 U. S. 394, 37 S. Ct. 152.

The *res*, over which these parties are contending, consists entirely of corporate securities which at all times since 1935 have been located in Delaware. There has been no seizure of them by any judicial process in Florida, nor has any person or corporation holding the assets voluntarily by appearance brought them before the Florida courts.

The Supreme Court of Florida purports to find jurisdiction over this trust *res* by reason of the Florida domicile of Mrs. Donner and the probate there of her will. In an action brought to construe that will it rendered a decision "as to whether or not the instruments which created their [remainder] interests were effective to shift the trust property out of the estate of the testatrix." This was done on the theory that the last effective act of Mrs. Donner to establish remainder interests in the trust corpus, i.e., the execution of the power of appointment of 1949, was performed by her while a resident of Florida and amounted to a republication of the trust of 1935; it was held that it was as if the original instrument had been executed while she was domiciled in Florida. As we have pointed out, this result is contrary to the law of Delaware, and also the recent trend of well considered decisions in other states.

The Florida court relies upon *Henderson v. Usher*, 118 Fla. 688, 160 S. 9, but as we read that case it does not support their holding. In the *Henderson* case an action was filed for the construction of the will of a Florida decedent which purported to exercise a power of appointment over the corpus of an *inter vivos* trust created by a Florida resident in New York with a New York trustee. The donor deposited the securities comprising the trust corpus in New York, and in the instrument gave a power of appointment by will to the life beneficiary, a Florida resident. The will of the Florida donee of the power created an admittedly testamentary trust by the exercise of his power of appointment over the *inter vivos* trust corpus. Thereafter, the trustees of the testamentary trust, non-residents of Florida, instituted suit for the construction of the Florida will so

that they might be instructed as to their duties under the will and the testamentary trust.

The precise question in the *Henderson* case was the validity of constructive service upon the widow of the testator, who had remarried and was a resident of New York. Constructive service upon her was upheld upon the ground that the *res* before the court was the Florida will, and the trust established by it, and since the trustees under the will had voluntarily submitted it to the courts of Florida for adjudication, jurisdiction had thereby been conferred over the testamentary trust. Furthermore, there was no question but that the Florida will had by the exercise of the power created a Florida testamentary trust. In issue was the right of the widow to receive income from the testamentary trust. There was no issue concerning the rights of anyone arising out of the New York *inter vivos* trust.

The *Henderson* case, therefore, is not authority for the assertion of jurisdiction by Florida over an *inter vivos* trust created and administered in Delaware. The will of Mrs. Donner, contrary to the apparent view of the Florida Supreme Court, did not exercise the reserved power of appointment. That power was exercised in 1949 and a part of the Delaware trust corpus was appointed to her Florida executrix and disposed of by the residuary clause of her will. With respect to this portion of the *inter vivos* trust corpus, it is clear that Florida has jurisdiction since it passes as part of Mrs. Donner's estate; but with respect to the 417,000 appointed to non-Floridians it is equally clear, not only that Mrs. Donner did not intend it to pass as part of her estate, but that Florida has never had the remotest connection with or power over it.

The Florida Supreme Court cites as further authority for its assumption of jurisdiction over the 1935 trust the case of *Swetland v. Swetland*, 105 N. J. Eq. 608, 149 A. 50; aff. 107 N. J. Eq. 504, 153 A. 907. This case, however, is not authority for the assumption of jurisdiction under these circumstances. The *Swetland* case was a bill for accounting

against a non-resident trustee based on the dissipation and misappropriation of the corpus of an *inter vivos* trust created and administered in New York. The complainants sought an injunction against the New Jersey executors of the creator's New Jersey will, which added a large amount to the original *inter vivos* trust corpus, from paying it over to the trustee, and sequestered the non-resident trustee's interest in the creator's New Jersey estate. Since the assets themselves were in the hands of New Jersey executors and had by sequestration been subjected to the power of the court, it was held that irrespective of the situs of the trust the court could enforce its decree to the extent of the property sequestered. It is plain that the *Swetland* case is distinguishable.

It follows, therefore that the Florida judgment is not entitled to full faith and credit as a judgment *in rem*, as to the \$17,000 which has never been subjected to the control of the Florida court and, as such, a bar to the action before us.

The Lewis Group next argues that irrespective of full faith and credit, the Florida judgment precludes the litigation of the question of essential validity of the 1935 trust as a matter of *res adjudicata* or, in the alternative, as a matter of collateral estoppel.

The doctrine of *res adjudicata* has no application in the pending action because the essence of the doctrine is that the prior judgment raised as a bar must have been rendered in a prior action between the same parties involving the same cause of action asserted in the second action. *Restatement, Judgments*, § 48; *Collateral Estoppel by Judgment*, 56 Harv. L. R. 1. It is obvious that we are dealing here with an entirely different cause of action from that tried in Florida. In Florida the issue was, what assets passed under the will of Mrs. Donner? The Florida ruling, that the exercise of the power of appointment was

testamentary, was an implicit ruling of invalidity of the 1935 agreement as an *inter vivos* trust, but it was only incidental to the main issue raised in the Florida proceeding.

This fact is sufficient answer to the assertion of the defense of *res adjudicata*, but it would seem to be clear that it could not be availed of in any event because of the inherent lack of jurisdiction of the Florida courts over some of the parties to this cause and over the subject matter of this suit.

The Lewis Group argues, in the alternative, that the Hanson Group, however, are collaterally estopped by the Florida judgment from relitigating the question of essential validity of the 1935 agreement as an *inter vivos* trust. The doctrine of collateral estoppel is recognized and applied in proper cases by Delaware courts. *Petrucci v. Landon*, 9 Terry 491, 107 A. 2d 236; *Niles v. Niles* (Del. Ch.), 111 A. 2d 697.

Florida in a direct proceeding would have had no jurisdiction to determine the validity of an *inter vivos* trust whose situs was in Delaware and whose trustee was not subject to Florida process. 54 *Am. Jur., Trusts*, § 564, § 584; *Lines v. Lines*, 142 Pa. 149, 21 A. 809. It may, however, occur that in an action in Florida over which Florida admittedly has jurisdiction it might become necessary for the Florida court to decide a question which it would have had no jurisdiction over in a direct proceeding brought for that purpose. In such event, when such question has actually been litigated and fought out by the same parties in the prior action, a collateral estoppel may sometimes be raised against such parties in a second action in which the same issue is raised. We are of the opinion, however, that no collateral estoppel arises in the pending case.

In the first place, a recognized exception to the doctrine exists when the second action is brought in a court having jurisdiction of the subject matter and parties to determine directly the issue decided only incidentally in the first

action. *Restatement, Judgments*, § 71; *Collateral Estoppel by Judgment*, 56 Harv. L. R. 1, 22; *Annotation*, 147 A. L. R. 225. The action before us was brought in the Court of Chancery to determine directly the validity of the 1935 agreement as an *inter vivos* trust and that court has jurisdiction of the subject matter and the necessary parties. Since the holding of invalidity by the Florida courts was only incidental to the main issue presented to it, the case falls directly within the exception to the doctrine.

In the second place, the doctrine of collateral estoppel is applied only when the same parties in the second action have had their day in court in the first action on the issue in question. This rule is based on the consideration that the proper administration of justice will be served best by limiting parties to one trial of one issue. See *Niles v. Niles*, *supra*.

The Florida judgment does not meet this condition, for the Delaware trustee and the beneficiaries of the exercise of the power have never had their day in court on this issue.

It does not answer this objection to argue, as the Lewis Group does, that these parties received notice of the pendency of the Florida action and could have appeared in that forum and defended the action. To be sure, they could have done so, but they elected not to, for there was no *res* before the Florida court the seizure of which would have furnished a compulsive force for their appearance. To hold that in the absence of jurisdiction over the *res* in controversy Florida can compel appearance through substituted service would be a violation of the due process clause of the 14th Amendment. *Pennoyer v. Neff*, 95 U. S. 714, 24 S. Ct. 565.

The Lewis Group argues, however that Wilmington Trust Company and Delaware Trust Company are bound by the Florida judgment to all intents and purposes as though they had appeared in the cause because the various beneficiaries of the trusts were subject to the jurisdiction of the

Florida court.⁹ The argument is that when a *cestui que trust* is bound by the judgment of a court, the trustee is likewise bound because he is in privity with the *cestui*. It is argued that these particular trustees were mere stakeholders and, as such, were unnecessary parties to the Florida action. *Thompson v. Hammond*, (N. Y.) 1 Edw. Ch. 497, and *First National Bank v. Ickes*, 60 F. Supp. 366, are cited in support of the argument. We have read these cases and are of the opinion that they do not remotely support the contention.

Furthermore, we think it the law that while a *cestui que trust* is bound in most circumstances by an adjudication against his trustee, *Iowa-Wisconsin Bridge v. Phoenix Corp.*, supra, the converse of that proposition is not the law, particularly when the adjudication affects the existence of the trust itself. It is the duty of a trustee to defend the existence of his trust, 2 *Scott on Trusts*, § 178, even against an attempt by the settlor and sole beneficiary to overthrow it. Cf. *Weymouth v. Delaware Trust Co.*, 29 Del. Ch. 1, 45 A. 2d 427. A trustee is also an indispensable party to a suit involving the trust property, and in defense of title to the trust property. 54 *Am. Jur., Trusts.*, § 584.

In view of this, it is impossible to accept on principle the argument that a judgment against a *cestui que trust* binds the non-appearing trustee. At the argument, counsel for both groups stated that they had found no authority so holding, nor have our own researches disclosed any. Upon reflection, we are not surprised that there is none, for any such rule might permit a beneficiary by shopping around among jurisdictions to defeat the trust against the manifest intent of the trustor. We, therefore, are of the opinion that the non-appearing defendants in Florida are not estopped by the judgment on the ground of privity with appearing defendants.

9. No similar argument is made with respect to the recipients of the \$17,000 appointment.

Finally, we think the public policy of Delaware precludes its courts from giving any effect at all to the Florida judgment of invalidity of the 1935 trust. We are dealing with a Delaware trust. The trust *res* and trustee are located in Delaware. The entire administration of the trust has been in Delaware. The attack on the validity of this trust raises a question of first impression in Delaware and one of great importance in our law of trusts. To give effect to the Florida judgment would be to permit a sister state to subject a Delaware trust and a Delaware trustee to a rule of law diametrically opposed to the Delaware law. It is our duty to apply Delaware law to controversies involving property located in Delaware, and not to relinquish that duty to the courts of a state having at best only a shadowy pretense of jurisdiction. Cf. *Taylor v. Crosson*, 11 Del. Ch. 145, 98 A. 375.

We conclude, therefore, that the agreement of 1935 between Mrs. Donner and Wilmington Trust Company created a valid *inter vivos* trust, that the exercise by Mrs. Donner of the power of appointment reserved in that agreement was effective to dispose of the trust corpus, and that the parties to this cause are not estopped by the Florida judgment from having those questions adjudicated by the Delaware Court of Chancery.

The judgment of the Court of Chancery will be affirmed.

IN THE
SUPREME COURT OF THE STATE OF DELAWARE.

DORA STEWART LEWIS, MARY WASHINGTON STEWART BORIE and PAULA BROWNING DENCKLA,

Defendants Below, Appellants,

v.

ELIZABETH DONNER HANSON, as Executrix and Trustee under the Last Will of Dora Browning Donner, deceased,

Plaintiff Below, Appellee,

WILMINGTON TRUST COMPANY, a Delaware corporation, as Trustee under three separate Agreements, (1) and (2) with William H. Donner dated March 18, 1932 and March 19, 1932, and (3) with Dora Browning Donner, dated March 25, 1935, et al.,

Defendants Below, Appellees.

No. 8, 1956.

Appeal from the Court of Chancery of the State of Delaware in and for New Castle County, Civil Action No. 531.

ORDER.

AND NOW, TO WIT: this 7th day of February, A. D. 1957, the petition of Dora Stewart Lewis, Mary Washington Stewart Borie and Paula Browning Denckla for re-argument having come on to be heard, and the same having been duly considered, it is

ORDERED, ADJUDGED and DECREED:

That the same be and hereby is denied, and it is

FURTHER ORDERED, ADJUDGED and DECREED:

That the mandate of this Court shall be stayed for a period of ninety (90) days from the date hereof to permit the said Dora Stewart Lewis, Mary Washington Stewart Borie and Paula Browning Denckla to apply to the Supreme

Court of the United States for a writ of certiorari, and, if such application be made within said period, the mandate of this Court shall be stayed until the final order of the Supreme Court of the United States.

DANIEL F. WOLCOTT,

Justice.

HOWARD M. BRAMHALL,

Justice.

JAMES B. CAREY,

Judge.

APPROVED AS TO FORM:

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Wilmington, Delaware

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Donner Winsor, Curtin Winsor,

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Attorney for Wilmington Trust

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Industrial Trust Building

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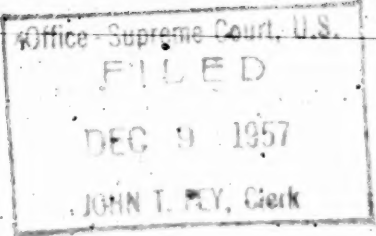
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Lewis, et al.



IN THE
Supreme Court of the United States

October Term, 1957.

No. 117.

DORA STEWART LEWIS, MARY WASHINGTON
STEWART BORIE and PAULA BROWNING
DENCKLA,

Petitioners,

ELIZABETH DONNER HANSON, as Executrix and Trustee
under the Last Will of Dora Browning Donner, Deceased, et al.,

Respondents.

On Writ of Certiorari to the Supreme Court of the State
of Delaware.

BRIEF FOR THE PETITIONERS.

ARTHUR G. LOGAN,

AUBREY B. LANK,

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Petitioners.

INDEX TO BRIEF FOR THE PETITIONERS.

	Page
OPINIONS BELOW	2
JURISDICTION	2
QUESTIONS PRESENTED	2
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	3
STATEMENT OF THE CASE	4
CHRONOLOGICAL SUMMARY OF FACTS	9
SUMMARY OF ARGUMENT	11
ARGUMENT	12
1. The Supreme Court of the State of Delaware Erred When It Refused to Accord Full Faith and Credit to the Judgment of the Supreme Court of the State of Florida	12
2. The Supreme Court of the State of Delaware Erred in Holding the Trust Agreement of March 25, 1935, and the Exercise of Certain Powers of Appointment There- under, Valid	23
CONCLUSION	24

TABLE OF CASES CITED.

	Page
Atkinson v. Los Angeles Superior Court (11/5/57) 26 L. W.	
2255	19
Hansberry v. Lee, 311 U. S. 32, 85 L. ed 22	6
Henderson v. Usher, 118 Fla. 688, 160 So. 9	16
Knox v. Knox (1912) 87 Kan. 381, 124 P. 409	18
Milliken v. Meyer, 311 U. S. 457, 85 L. ed 278	12, 20
Mullane v. Central Hanover Bank & Trust Company, 339 U. S.	
306, 94 L. ed 865	16
Pennoyer v. Neff, 95 U. S. 714, 24 L. ed 565	18, 19
Riley v. New York Trust Company, 315 U. S. 343, 86 L. ed	
885	20
State, ex rel. B. F. Goodrich Co. v. Trammell, 140 Fla. 500, 192	
So. 175	13

TABLE OF STATUTES AND AUTHORITIES CITED.

	Page
Annotations, 94 L. ed 1167	18
Annotations, 96 L. ed 495	18
Expanding Jurisdiction Over Foreign Corporations, 37 Cornell	
Law Quarterly 458	19
Florida Statutes Annotated:	
Constitution Art. 5, Sec. 11	13
Chapter 48	14, 15
Chapter 87, Section 87.02	13
Rev. Stat., § 905	3
28 U. S. C. § 1257(3)	2
28 U. S. C. § 1738	3, 22
United States Constitution, Article 4, § 1	3

IN THE
Supreme Court of the United States.

OCTOBER TERM, 1957.

No. 117.

DORA STEWART LEWIS, MARY WASHINGTON STEWART BORIE
and PAULA BROWNING DENCKLA,

Petitioners,

v.

ELIZABETH DONNER HANSON, as Executrix and Trustee
Under the Last Will of Dora Browning Donner, De-
ceased,

WILMINGTON TRUST COMPANY, a Delaware Corporation, as
Trustee Under Three Separate Agreements, (1) and
(2) With William H. Donner Dated March 18, 1932 and
March 19, 1932, and (3) With Dora Browning Donner
Dated March 25, 1935,

DELAWARE TRUST COMPANY, a Delaware Corporation, as
Trustee Under Three Separate Agreements, (1) With
William H. Donner Dated August 6, 1940, and (2) and
(3) With Elizabeth Donner Hanson, Both Dated No-
vember 26, 1948,

KATHERINE N. R. DENCKLA,

ROBERT B. WALLS, JR., ESQUIRE, Guardian ad Litem for
Dorothy B. R. Stewart and William Donner Denckla,

ELWYN L. MIDDLETON, Guardian of the Property of Dorothy
B. R. Stewart, a Mentally Ill Person,

EDWIN D. STEEL, JR., ESQUIRE, Guardian ad Litem for
Joseph Donner Winsor, Curtin Winsor, Jr., and Don-
ner Hanson,

BRYN MAWR HOSPITAL, a Pennsylvania Corporation, MIRIAM
V. MOYER, JAMES SMITH, WALTER HAMILTON, DOROTHY
A. DOYLE, RUTH BRENNER and MARY GLACKENS,

LOUISVILLE TRUST COMPANY, a Kentucky Corporation, as
Trustee for Benedict H. Hanson, and as Trustee Under
Agreements With William H. Donner,

WILLIAM DONNER ROOSEVELT, JOHN STEWART and
BENEDICT H. HANSON,

Respondents.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE
STATE OF DELAWARE

BRIEF FOR THE PETITIONERS.

OPINIONS BELOW

The opinion of the Supreme Court of the State of Delaware (A222-244) ² is reported at Del. , 128 A. 2d 819. The opinion of the Court of Chancery of the State of Delaware (A173-190) is reported at Del. Ch. , 119 A. 2d 901.

JURISDICTION.

The mandate of the Supreme Court of the State of Delaware was stayed by virtue of an order dated February 7, 1957, to permit petitioners to apply for a writ of certiorari (A248-249). The petition was filed on May 7, 1957, and was granted on June 17, 1957 (354 U. S. 920). The jurisdiction of this Court is invoked under 28 U. S. C. § 1257 (3).

QUESTIONS PRESENTED.

1. Did not the Supreme Court of the State of Delaware err when it refused to accord full faith and credit to the judgment of the Supreme Court of the State of Florida?

2. Did not the Supreme Court of the State of Delaware err in holding the trust agreement of March 25, 1935, and the exercise of certain powers of appointment thereunder, valid?

1. A companion case in this Court is an appeal from the Supreme Court of the State of Florida filed on April 17, 1957. It is captioned in this Court: "Elizabeth Donner Hanson, Individually, as Executrix of the Will of Dora Browning Donner, deceased, et al., Appellants, vs. Katherine N. R. Denckla, Individually, and Elwyn L. Middleton, as Guardian of the Property of Dorothy Browning Stewart, Etc. No. 107, October Term, 1957." The question of jurisdiction in said case was postponed on June 17, 1957, and this Court ordered that the case be consolidated with this case and a total of two (2) hours allowed for oral argument. The opinion of the Supreme Court of the State of Florida in said case (A207-218) is unreported.

2. References to the Transcript of Record will be (A—).

**CONSTITUTIONAL AND STATUTORY PROVISIONS
INVOLVED.**

The petition involves the meaning and effect of Article 4, § 1, of the United States Constitution (the Full Faith and Credit Clause), as made applicable by Rev. Stat., § 905; 28 U. S. C. § 1738.

STATEMENT OF THE CASE.

Dora Browning Donner moved from Pennsylvania to Florida in 1944, and took up residence (A74). She continued to reside in Florida until she died on November 20, 1952, a citizen, resident of, and domiciled in the State of Florida, leaving a Last Will and Testament dated December 3, 1949 (A3, 74). Her Will named her daughter, respondent Elizabeth Donner Hanson, a Florida resident, as Executrix and, after disposing of personal effects, divided the residuary estate into two parts: one to Delaware Trust Company of Wilmington, Delaware, as trustee under a trust for the benefit of another daughter, Katherine N. R. Denckla Ordway, and the other part to daughter Elizabeth Donner Hanson, but as trustee for the benefit of still another daughter, Dorothy B. Rodgers Stewart (A14-20). The Will was duly admitted to probate in the County Judges' Court in Palm Beach County, Florida, on December 23, 1952 and the Executrix, qualified (A3, 73).

Prior to the execution of the Will, and while she was a resident of Pennsylvania, Mrs. Donner had entered into an agreement dated March 25, 1935 (hereinafter called trust agreement), with Wilmington Trust Company of Wilmington, Delaware, the named trustee therein (A21). Under said trust agreement the trustee was to pay the net income to the trustor during her lifetime and, upon her death, to assign and deliver the trust fund unto such persons and in such manner and amounts as she should have appointed (1) by the last written instrument in writing executed by her and delivered to Wilmington Trust Company or (2), failing any such appointment, by her Last Will and Testament (A22). The trust agreement provided that Mrs. Donner could amend, alter, or revoke it in whole or in part at any time or times. The trust agreement also provided that the trustee could act only with the written direction or consent of the adviser of the trust and Mrs. Donner retained the right to nominate any additional advisers or change ad-

visers during her lifetime. She also retained other broad powers, including the power to remove the trustee (A21-29). The net result of the cumulative retained powers and the manner whereby the trust was administered was to create the relationship of principal and agent between Mrs. Donner and the named so-called trustee, Wilmington Trust Company (A127-156).

Mrs. Donner purported to exercise the power of appointment contained in the trust agreement by executing and delivering to Wilmington Trust Company an instrument dated December 3, 1949, which was the same day as the execution of her Will, directing the manner whereby the trust fund should be distributed. This instrument was amended in a minor respect on July 7, 1950 (A30-34, 35-37). The exercise of the power in 1949, and the amendment in 1950, while she was a resident of Florida, constituted republications in Florida of the original trust agreement (A213). The appointment of December 3, 1949, as amended on July 7, 1950,³ provided for a plan of distribution which, insofar as the same is material in this cause,⁴ directed the trustee, Wilmington Trust Company, to pay over the sum of \$400,000.00 to Delaware Trust Company under two separate trusts dated November 26, 1948, created by her daughter, Elizabeth Donner Hanson, for the benefit of her sons, Joseph Donner Winsor and Donner Hanson, in equal amounts, and the remainder to her as Executrix (A30-34, 35-37).

The Will did not provide for the payment of said sum of \$400,000.00 and, accordingly, if said power of appointment was invalid, the entire \$400,000.00 should also have gone to Mrs. Hanson as Executrix and become part of the residuary estate. The dispute involved is whether the

3. Other earlier attempts were made to exercise the power of appointment, but were revoked by the December 3, 1949, appointment. Many of the parties named below were named because provisions had been made for them in early revoked powers of appointment (A38-44, 45-46).

4. Dispositions other than those material herein totaling \$17,000.00 were included.

\$400,000.00 should have gone as provided by said power of appointment or as provided under the Will.

After Mrs. Donner's death, a dispute arose with respect to what assets passed under Mrs. Donner's Will in the State of Florida. The assets held by Wilmington Trust Company under the trust agreement totaled \$1,493,629.91 (A104). On June 26, 1953, the Executrix filed her inventory in Florida and included therein, as assets of the Florida estate, all property held by Wilmington Trust Company under the trust agreement (A170).

A declaratory judgment action was commenced on January 22, 1954, in the Circuit Court for Palm Beach County, Florida, by Katherine N. R. Denckla and Elwyn L. Middleton, guardian of the property of Dorothy B. R. Stewart, against Wilmington Trust Company, Delaware Trust Company and other parties. The other parties were direct and contingent beneficiaries under said purported power of appointment and under previous powers of appointment and also direct and contingent beneficiaries under the Will⁵ (A70-82). Of the named Defendants, Elizabeth Donner Hanson, individually and as Executrix under the last Will and Testament of Mrs. Donner, and as guardian for Donner Hanson, Joseph Donner Winsor and William D. Roosevelt, appeared (A172). Wilmington Trust Company and Delaware Trust Company, in their individual corporate capacities and as trustees were served by publication and by mail (A172; F. R. 37-39)⁶, but chose not to appear or answer.

The Florida Circuit Court held, on January 14, 1955, that, as between the appearing parties the trust instrument

5. One remote, contingent beneficiary under the purported power of appointment, Curtin Winsor, Jr., was not named. He was represented by his mother, who was guardian *ad litem* for the primary beneficiaries, and he was also represented as a member of a class. *Hansberry v. Lee*, 311 U. S. 32; 85 L ed 22.

6. References to the transcript of record on the appeal from the Florida Supreme Court, No. 107, will be (F. R. —). Said transcript of record has been supplemented to show that the complaint in the Florida case was mailed to all nonresidents.

and powers of appointment exercised in 1949 and 1950 were invalid and that the trust fund passed under the residuary clause of the will of Mrs. Donner. The Court held further that it had no jurisdiction over the non-appearing defendants (A83-85).

Upon appeal to the Supreme Court of the State of Florida, that Court affirmed the Circuit Court on September 19, 1956, as to the invalidity of the 1949 and 1950 powers of appointment and the trust agreement, but reversed with respect to the jurisdiction of the Court over non-answering defendants (A207-218).

Elizabeth Donner Hanson, the Executrix, apparently fearing that, although she was the Executrix, a Florida resident and Florida domiciliary, she might, in some way, be unfairly treated by the Florida Courts, filed an action for a declaratory judgment in the Court of Chancery of the State of Delaware on July 28, 1954, praying that the Court determine the persons entitled to participate in the fund, under the Trust agreement and under her mother's powers of appointment of 1949 and 1950 (A3-46). The parties named in the Delaware action are almost identical with those named in the Florida action with the exception that certain servants of Mrs. Donner and Curtin Winsor, Jr., were named as defendants who were not named in the Florida action.

Both corporate trustees, Wilmington Trust Company and Delaware Trust Company, Joseph Donner Winsor, Curtin Winsor, Jr., Donner Hanson, Dorothy B. R. Stewart, William Donner Denckla, Dora Stewart Lewis, Mary Washington Stewart Borie and Paula Browning Denckla appeared in person or by guardians *ad litem* in the Delaware action and filed answers (A47-69). Petitioners' answer is set forth at A60-69. Petitioners, together with Robert B. Walls, Jr., guardian *ad litem* for Dorothy B. R. Stewart and William Donner Denckla, comprised what the Delaware Supreme Court called the "Lewis group". The other defendants and the plaintiff were called the "Hanson group".

The Lewis group contends that the trust agreement is invalid and the exercise of the 1949 and 1950 powers of appointment were testamentary and ineffective to pass any interest, and that, therefore, the entire trust fund should have passed under the Will of the decedent.

The Hanson group on the other hand maintains that the trust is valid and the transfer of the \$400,000.00 by the Wilmington Trust Company pursuant to the exercise of the 1949 power of appointment was sufficient to pass title. Adoption of either group's contention would financially benefit the members of that group.

The Delaware Court of Chancery granted summary judgment (A191-198) in favor of the Hanson group on January 13, 1956, directly in the face of the prior Summary Final Decree of the Florida Circuit Court entered on January 14, 1955, in favor of the Lewis group (A83-85). On appeal the Delaware Supreme Court affirmed on February 7, 1957, and thus held for the Hanson group (A222-249) even though the Florida Supreme Court previously had held for the Lewis group on September 19, 1956 (A207-218). Both Delaware courts refused to give full faith and credit to the Florida judgment.

CHRONOLOGICAL SUMMARY OF FACTS.

1935. On March 25, 1935, Dora Browning Donner, while a resident of Pennsylvania, executed the trust agreement, and deposited securities thereunder with Wilmington Trust Company of Wilmington, Delaware, the named trustee (A 7-8, 21-29, 74-75). She reserved broad powers in the trust agreement including, *inter alia*, (a) power to remove the trustee; (b) power to terminate and revoke the trust, and (c) power to designate beneficiaries at her death (A21-29).

1944. Mrs. Donner moved from Pennsylvania to Florida and established residence and continued as a Florida resident until she died (A74, 208).

1949. On December 3, 1949, Mrs. Donner executed a Last Will and Testament naming her daughter Elizabeth Donner Hanson Executrix (A3, 14-20).

On December 3, 1949, Mrs. Donner also exercised a power of appointment providing for the distribution of the assets held by Wilmington Trust Company, as trustee under the trust agreement, to certain named beneficiaries (A30-34).

1950. Mrs. Donner again exercised a power of appointment under the trust agreement making a minor change in the 1949 designation. This was done on July 7, 1950 (A35-37).

1952. Mrs. Donner died on November 20, 1952. Her Will was duly admitted to probate on December 23, 1952, in the County Judges' Court in and for Palm Beach County, Florida, and her daughter, Elizabeth Donner Hanson, qualified as Executrix (A3).

1953. On June 26, 1953, the Executrix filed her Inventory and included therein, as assets of the estate, all property held by Wilmington Trust Company under the trust agreement, as the same was amended in 1949 and 1950 (A170). At the time, the assets held by Wilmington Trust Company under said trust agreement totaled \$1,493,629.91 (A 104).

1954. On January 22, 1954, an action was started in the Circuit Court for Palm Beach County, Florida by beneficiaries under Mrs. Donner's Will for a declaratory judgment to ascertain what assets passed under the Florida Will, and in that connection, to determine the validity or invalidity of the trust agreement (A70-82).

On July 28, 1954, the Florida Executrix filed an action in the Court of Chancery of the State of Delaware for a declaratory judgment to ascertain what assets passed under the Florida Will, and in that connection, to determine the validity or invalidity of the trust agreement (A3-46).

1955. On January 14, 1955, the Florida Circuit Court entered a Summary Final Decree holding that the trust agreement was invalid and that all the assets held by Wilmington Trust Company passed under the Will (A83-85).

1956. On January 13, 1956, the Delaware Court of Chancery granted a Summary Judgment holding the trust agreement valid and that the assets held by Wilmington Trust Company were distributable under the trust agreement (A191-198).

On September 19, 1956, the Florida Supreme Court affirmed the Florida lower court and held the trust agreement invalid and that the Florida Court had jurisdiction over the subject matter and persons of non-answering defendants (A207-218).

1957. On February 7, 1957, the Delaware Supreme Court affirmed the Delaware Court of Chancery and held the trust agreement valid and that the Florida Court had no jurisdiction over non-answering defendants (A222-249).

On February 21, 1957, an appeal was taken from the decision of the Florida Supreme Court to this Court and is presently pending as a companion case to this case (Footnote 1, p. 2).

The petitioners herein filed a petition for a writ of certiorari on May 7, 1957, which was granted on June 17, 1957. 354 U. S. 920.

SUMMARY OF ARGUMENT.

As shown above, the Florida Circuit Court first held the trust agreement to be invalid. The Delaware Court of Chancery then held it to be valid. Following that, the Florida Supreme Court held the trust agreement to be invalid. After that, the Delaware Supreme Court held the trust agreement to be valid.

Both the Delaware lower court and the Delaware Supreme Court refused to follow the prior adjudications on the point by the Florida Courts. The Delaware Supreme Court specifically rejected petitioners' contention that the Florida judgment was entitled to full faith and credit (A 236-241). Petitioners contend that the Delaware Supreme Court erred when it refused to give full faith and credit to the judgment of the Florida Supreme Court that the trust agreement was invalid.

ARGUMENT.**1. The Supreme Court of the State of Delaware Erred When It Refused to Accord Full Faith and Credit to the Judgment of the Supreme Court of the State of Florida.**

Both the Florida Supreme Court and the Delaware Supreme Court dealt with the facts set forth above which, for all pertinent purposes, are undisputed (A208, 225, 228). The two courts dealt with the same facts and the same authorities and contentions and arrived at diametrically opposite judgments. This irreconcilable conflict between the Florida Supreme Court and the Delaware Supreme Court was recognized by the Delaware Court when it characterized these cases as "a headlong jurisdictional collision between states" (A228).

The judgment of the Florida Supreme Court came first and we urged below that it should have been given full faith and credit (A238-244).

Where a judgment rendered in one state is challenged in another, the only questions open to inquiry are "a want of jurisdiction over either the person or the subject matter . . ." *Milliken v. Meyer*, 311 U. S. 457, 462; 85 L ed 278, 282.

Neither the Delaware Supreme Court nor the respondents in this case have questioned the jurisdiction of the Florida Court over the subject matter. The action started in the Circuit Court for Palm Beach County, Florida was for a declaratory judgment to determine what portion of the trust property held by Wilmington Trust Company, under the trust agreement, should have passed under the residuary clause of the Florida Will of Mrs. Donner (A 32).

There can be no question but that the Florida Court had stature to take jurisdiction over this question. The Circuit Courts of the State of Florida are specifically given

jurisdiction and powers by the Constitution of that State. *Florida Statutes Annotated*, Constitution Art. 5, Sec. 11. The Courts are granted original jurisdiction in all cases in equity and at law not cognizable by the inferior courts. It was held in *State, ex rel. B. F. Goodrich Co. v. Trammell*, 140 Fla. 500, 192 So. 175 that the Circuit Courts have exclusive jurisdiction over such cases.

Section 87.02 of Chapter 87 of Florida Statutes Annotated deals with declaratory decrees and provides that any person claiming to be interested or who may be in doubt as to his rights under a will, may have any question of construction or validity arising under such will determined and obtain a declaration of his rights thereunder.

Since Dora Browning Donner died a citizen of and domiciled in Florida, it is apparent that the Circuit Court had jurisdiction to hear the suit for Declaratory Judgment brought in equity in Florida to determine what property passed under her Will.

The Florida Supreme Court said:

"We shall first consider the contention of appellants that the circuit court of Palm Beach County erred in holding the trust and the powers of appointment exercised thereunder invalid as testamentary in character. As a preliminary inquiry, it is necessary to determine whether or not jurisdiction existed in the courts of Florida to pass upon the validity of these instruments.

"There can be no doubt that the court below possessed substantive jurisdiction to determine this issue. Jurisdiction existed by virtue of the will, which had been duly probated in Florida, the testatrix' domiciliary state. Reference having been made in the will, as we have seen, to powers of appointment, and the question of effective exercise thereof having been properly raised, the chancellor below had no alterna-

tive but to examine the trust instrument and documents executed thereunder and declare them valid or invalid. This is to be distinguished from a case wherein questions of administration or validity of a purported inter vivos trust arise absent a will or any reference therein. Cf. *Wilmington Trust Co. v. Wilmington Trust Co.*, Del., 24 A. 2d 309, wherein the settlor had executed a will making no reference whatever to the power of appointment conferred on him by the (previously executed) trust agreement . . . and it was held that the Delaware courts had jurisdiction to determine the validity of trust powers, although the settlor died a domiciliary of another state. In the case now presented, it would have been an abdication or abandonment of jurisdiction, which we would have been obliged to correct, if the chancellor below had failed to answer the question which was duly brought before him for adjudication." (A210-211).

The question of jurisdiction of the Florida Court over the persons of Wilmington Trust Company and Delaware Trust Company, defendants named in the Florida proceedings, was questioned by the Delaware Supreme Court and by the respondents because Wilmington Trust Company and Delaware Trust Company were non-residents of the State of Florida and chose not to appear or answer (A 242-243). They were summoned by constructive service of process. Notice of suit was published (F. R. 37, 39) and copies of the complaint were served on them by mail (Supplement to Transcript of Record in case No. 107).

Chapter 48 of Florida Statutes Annotated deals with constructive service of process and provides for constructive service by publication and mail as was done in this case. Section 48.01 of Chapter 48 provides:

"Service of process by publication may be had . . . for the construction of any will, deed, contract,

or other written instrument and for a judicial declaration or enforcement of any legal or equitable right, title, claim, lien, or interest thereunder."

Section 48.02 of Chapter 48 provides for constructive service of process upon

"any corporation or other legal entity, whether its domicile be foreign, domestic, or unknown."

The Florida Supreme Court held that the constructive service of process on Wilmington Trust Company and on Delaware Trust Company was effective. It said:

"We next consider the contention made on the cross-appeal that the chancellor erred in ruling that he lacked jurisdiction over the persons of certain absent defendants, summoned to appear by constructive service of process. These defendants were the trustee and persons who would benefit under the last power of appointment executed under the trust, and against the will. In *Henderson v. Usher*, *supra*, 160 So. 9, we upheld constructive service of a citizen of New York, although the trust 'res', consisting entirely of intangible personalty was physically located in New York, and the trust was administered there by the Chase National Bank of New York, as trustee. We held that constructive service was valid in that state of the record because substantive jurisdiction existed in the Florida court by virtue of construction of a will, which was also involved, the testator having been domiciled in Florida. We observed that it was not essential that the assets of the trust be physically in this state in order that constructive service be binding upon a non-resident where the problem presented to the court was to adjudicate, inter alia, the status of the securities incorporated in the trust estate and the rights of the non-resident therein. It is entirely con-

sistent with the *Henderson* case to hold, as we do, that the court below erred in ruling that it lacked jurisdiction over the persons of the absent defendants." (A217).

We submit that the Florida Supreme Court properly held that the service on Wilmington Trust Company and Delaware Trust Company, whereby they were summoned to appear by constructive service of process, was in accordance with the latest pronouncements of this Court. The Florida Court had before it for decision the question of what passed under the Florida Will which required a decision as to the validity of the trust agreement and the purported exercises of powers thereunder. The question involved a vital interest of the state in bringing to issue and for final decision interests and claims of its fiduciaries and domiciliaries. The Florida Court relied on its earlier decision in *Henderson v. Usher*, 118 Fla. 688, 160 So. 9, which held that an intangible *res*, such as is involved in this case by virtue of Mrs. Donner's Will and her republication of the trust agreement while a resident of Florida, had a constructive situs equivalent to a physical situs in Florida ample to give jurisdiction to the Florida Court.

That the Florida Court was justified in coming to the conclusion it did and that said non-answering defendants were accorded due process is found in the fact that the constructive service of process brought adequate notice to them and they were given an opportunity to be heard with respect to their and other interests in the matter for decision before the Florida Court. In *Mullane v. Central Hanover Bank & Trust Company*, 339 U. S. 306, 311-315, 94 L ed 865, 872-873, this Court, in dealing with a problem similar in quality, said:

"We are met at the outset with a challenge to the power of the State—the right of its courts to adjudicate at all as against those beneficiaries who

reside without the State of New York. It is contended that the proceedings is one in personam in that the decree affects neither title to nor possession of any res, but adjudges only personal rights of the beneficiaries to surcharge their trustee for negligence or breach of trust. Accordingly, it is said, under the strict doctrine of *Pemoyer v. Neff*, 95 U. S. 714, 24 L. ed 565, the Surrogate is without jurisdiction as to non-residents upon whom personal service of process was not made."

“Judicial proceedings to settle fiduciary accounts have been sometimes termed in rem, or more indefinitely quasi in rem, or more vaguely still, ‘in the nature of a proceeding in rem.’ It is not readily apparent how the courts of New York did or would classify the present proceeding, which has some characteristics and is wanting in some features of proceedings both in rem and in personam. But in any event we think that the requirements of the Fourteenth Amendment to the Federal Constitution do not depend upon a classification for which the standards are so elusive and confused generally and which, being primarily for state courts to define, may and do vary from state to state. Without disparaging the usefulness of distinctions between actions in rem and those in personam in many branches of law, or on other issues, or the reasoning which underlies them, we do not rest the power of the State to resort to constructive service in this proceeding upon how its courts or this Court may regard this historic antithesis. It is sufficient to observe that, whatever the technical definition of its chosen procedure, the interest of each state in providing means to close trusts that exist by the grace of its laws and are administered under the supervision of its courts is so insistent and rooted in custom as to establish beyond doubt the right of its courts

interests of the parties to this litigation, even though the Florida Court announced it was applying the law of Florida, would establish the same law for Delaware. This approach was and is patently erroneous. This erroneous approach brought the Delaware Supreme Court to the conclusion that to allow the Florida judgment to be enforced in Delaware would be contrary to the public policy of Delaware. The Delaware Supreme Court failed to grasp the effect and function of the Full Faith and Credit Clause. The Clause, as implemented by the statute, only provides that "judgments", which means, of course, rights established between litigants, have the same force and effect in every Court throughout the United States that they have in the state where they were rendered. 28 U. S. C. § 1738. To allow the Florida judgment to have such force and effect in this litigation would not result in a decision which in any way could be "one of great importance in our law of trusts." (A244) The Florida decision, although binding in this case, could not be considered a mandatory precedent in the law of trusts in Delaware.

The Florida Supreme Court settled once and for all, between the litigants involved here, their rights and made its judgment the law of the case not the law of Delaware.

Another reason given by the Delaware Supreme Court to bolster its position not to accord full faith and credit, was that petitioners are seeking personal judgments against Wilmington Trust Company and Delaware Trust Company (A237-238). That is not the case. It is true that petitioners in their answer, counterclaim and cross-claims, included such prayers, but they were filed before the Florida judgment and were based on the contention that the trust agreement was invalid and, accordingly, judgments *in personam* should be granted against the two trust companies. Petitioners are now seeking to have the Delaware Courts accord full faith and credit to the Florida judgment holding the trust agreement invalid. This is not a request for a judgment *in personam* against either Wilmington Trust

Company or Delaware Trust Company based on the Florida judgment. It would merely result in this Court requiring the Delaware Courts to recognize the judgment of the Florida Court that the trust agreement and the purported exercises of the powers under it were invalid. This should then result in the Delaware Court of Chancery entering a decree holding the trust agreement and the purported exercise of powers thereunder invalid and, thereafter, grant such relief in the Delaware proceedings as would be needed to implement such decision. The judgment *in personam* would be a Delaware judgment *in personam* based on the rights flowing from the recognition by Delaware that Florida had stricken down the trust agreement and the powers.

2. The Supreme Court of the State of Delaware Erred in Holding the Trust Agreement of March 25, 1935, and the Exercise of Certain Powers of Appointment Thereunder, Valid.

In the appeal from the decision of the Florida Supreme Court (No. 107) there will be argued the question of whether or not the Supreme Court of Florida erred in coming to the conclusion that the trust agreement and the purported exercise of powers thereunder were invalid. We do not know whether this Court granted *certiorari* in this case to test the question of whether or not the Delaware Supreme Court erred in holding them valid. If this Court will entertain that question, then, in order to prevent duplicity, we hereby incorporate by reference the arguments which are being made by the appellees in case No. 107. Furthermore, we point out to the Court that both the opinion of the Florida Supreme Court and the opinion of the Delaware Supreme Court deal with the same facts and same authorities and come to diametrically opposite results. We believe the conclusions reached and the result reached by the Florida Supreme Court to be the proper and correct ones and adopt them as our argument in support of our contention that the Delaware Supreme Court erred.

to determine the interests of all claimants, resident or nonresident, provided its procedure accords full opportunity to appear and be heard."

"Personal service of written notice within the jurisdiction is the classic form of notice always adequate in any type of proceeding. But the vital interest of the state in bringing any issues as to its fiduciaries to a final settlement can be served only if interests or claims of individuals who are outside of the State can somehow be determined. A construction of the Due Process Clause which would place impossible or impractical obstacles in the way could not be justified."

"The Court has not committed itself to any formula achieving a balance between these interests in a particular proceeding or determining when constructive notice may be utilized or what test it must meet. Personal service has not in all circumstances been regarded as indispensable to the process due to residents, and it has more often been held unnecessary as to non-residents."

See also *Knox v. Knox* (1912) 87 Kan. 381, 124 P. 409.

The Delaware Supreme Court took the view that since Wilmington Trust Company and Delaware Trust Company did not appear or answer, they were not before the Florida Court and the Florida Court did not acquire jurisdiction over them so as to give its judgment binding force and effect in the State of Delaware. In doing so, that Court applied the very "strict doctrine" of *Pennoyer v. Neff*, 95 U. S. 714, 24 L. ed 565. The Court, in doing so, disregarded the development of the doctrine of *Pennoyer v. Neff* as regards jurisdiction over non-resident individuals and foreign corporations. See *Annotations*, 94 L. ed 1167 and 96 L. ed 495, and

see *Expanding Jurisdiction Over Foreign Corporations*, 37 *Cornell Law Quarterly* 458. The latest inroad on the doctrine of *Pennoyer v. Neff* is to be found in a recent decision by the California Supreme Court. In *Atkinson v. Los Angeles Superior Court* (11/5/57) 26 L W 2255, the Court concluded that the non-residence of a trustee under a royalty agreement did not deprive the California Court of jurisdiction to resolve a dispute over the royalties. The Court pointed out that with respect to jurisdiction to tax intangibles, jurisdiction over foreign corporations, and jurisdiction to adjudicate trust obligations, emphasis is no longer placed on actual or physical presence, but on the bearing that local contracts have to the question of over-all fair play and substantial justice.

Certainly over-all fair play and substantial justice require a finding in this case that Wilmington Trust Company and Delaware Trust Company were properly served with adequate notice and had an opportunity to be heard in a matter of vital interest to their beneficiaries. They were only stakeholders and cannot say that there would have been a great burden on them to appear in Florida and allow their beneficiaries to litigate to a finality the basic question of which set of fiduciaries was entitled to the \$400,000.00.

We submit, therefore, that the Florida Court had jurisdiction over the persons of said non-answering defendants as well as over the answering defendants and over the subject matter and therefore, that its judgment was entitled to full faith and credit in Delaware.

The Delaware Supreme Court determined, however, not only to base its refusal to accord full faith and credit to the judgment of the Florida Court because of lack of jurisdiction over the persons of some defendants, but went further and did so on the theory that the Florida Supreme Court made a mistake and that, therefore, the Delaware Court could review the entire matter on the merits. Nothing is better settled than that full faith and credit is intended to eliminate an inquiry such as the Delaware Su-

preme Court made after the decision by the Florida Supreme Court. In *Milliken v. Meyer*, 311 U. S. 457, 462, 85 L ed 283, 282-283, this Court pointed out that where one Court has jurisdiction over the person and the subject matter, the judgment is not "open to inquiry." This Court said:

"In such case the full faith and credit clause of the Constitution precludes any inquiry into the merits of the cause of action, the logic or consistency of the decision, or the validity of the legal principles on which the judgment is based. *Fauntleroy v. Linn*, 210 US 230, 52 L ed 1039, 28 S Ct 641; *Roche v. McDonald*, 275 US 449, 72 L ed 365, 48 S Ct 142, 53 ALR 1141; *Titus v. Wallick*, 306 US 282, 83 L ed 653, 59 S Ct 557. Whatever mistakes of law may underlie the judgment (*Cooper v. Reynolds*, 10 Wall. (US) 308, 19 L ed 931) it is 'conclusive as to all the media concludendi.' *Fauntleroy v. Lum*, *supra* (210 US at p. 237; 52 L ed 1042, 28 S Ct 641)."

In *Riley v. New York Trust Company*, 315 U. S. 343, 348-349, 86 L ed 885, 891, this Court said:

"This clause of the Constitution brings to our Union a useful means for ending litigation. Matters once decided between adverse parties in any state or territory are a rest. Were it not for this full faith and credit provision, so far as the Constitution controls the matter, adversaries could wage again their legal battles whenever they met in other jurisdictions. Each state could control its own courts but itself could not project the effect of its decisions beyond its own boundaries. Cf. *Pennoyer v. Neff*, 95 US 714, 722, 24 L ed 565, 568. That clause compels that controversies be stilled so that where a state court has jurisdiction of the parties and subject matter, its judgment controls in other states to the same extent as it does in the state where rendered."

The Delaware Supreme Court first determined to review the facts and authorities to determine what law governed the question which had been before the Florida Court concerning the construction of the trust agreement. The Florida Court had determined that since Mrs. Donner had republished the trust agreement in 1949 and in 1950 while a resident of Florida, and had died a resident of Florida leaving a Will tying in the exercises of the powers in 1949 and 1950, that the law of Florida governed. The Delaware Supreme Court rejected the Florida decision on this point and said that the law of Delaware governed because the securities held by Wilmington Trust Company under the terms of the trust agreement were physically in Delaware. We submit that under the Full Faith and Credit Clause the Delaware Supreme Court was without power to make such determination. The Delaware Supreme Court then determined that, on the same facts and after consulting the same authorities, the law announced by the Florida Supreme Court as to the invalidity of the trust agreement and the exercises of the powers was wrong. The Delaware Court did so under the guise of concluding that the law of Delaware differed from the law of Florida as the Supreme Court of Florida had announced it. Both Courts had started on the premise that the facts created a question of first impression (A213, 244). What the Delaware Court did, in effect, was to review and act as an appellate Court in dealing with the judgment of the Florida Supreme Court and to reverse it. It was without power to do so.

We do not challenge the right of the Delaware Court to announce that Delaware law involving the construction of a trust agreement may differ from Florida law and to make that the law of Delaware, but we do challenge the right of the Delaware Court to refuse, as between the parties to this litigation, the rights and interests established in the Florida litigation. The Delaware Supreme Court seems to have been under the impression that to allow the Florida judgment to stand in this case as the definition of the rights and

CONCLUSION.

The action of the Delaware Supreme Court should be reversed.

Respectfully submitted,

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IN THE

Supreme Court of the United States

October Term, 1957

No. 117.

DORA STEWART LEWIS, MARY WASHINGTON
STEWART BORIE and PAULA BROWNING
DENCKLA,

Petitioners,

v.

ELIZABETH DONNER HANSON, as Executrix and Trustee
under the Last Will of Dora Browning Donner, Deceased, et al.,

Respondents.

On Writ of Certiorari to the Supreme Court of the State
of Delaware.

Reply Brief for the Petitioners.

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INDEX TO REPLY BRIEF FOR THE PETITIONERS.

	Page
I. The Nonresident, Non-Appearing Defendants in the Florida Litigation; Who Were Served by Constructive Process and Given an Opportunity to Appear and Be Heard, Were and Are Bound by the Florida Judgment Under the Doctrine Announced in <i>McGee v. International Life Ins. Co.</i>	2
II. The Florida Judgment Is Binding on Curtin Winsor, Jr., Who Was and Is a Remote, Contingent Beneficiary	7
III. Conclusion	11

TABLE OF CASES CITED.

	Page
Bigelow v. Old Dominion Copper Min. & Smelting Co., 225 U. S. 111, 56 L. ed. 1009	8
Guayaquil & Quito Railway Co. v. Suydam Holding Corp., (Sup. Ct. Del., 1957) Terry, 132 A. 2d 60	11
Longworth v. Duff, (Sup. Ct. Ill., 1921) 297 Ill. 479, 130 N. E. 690	10
McGee v. International Life Ins. Co., (December 16, 1957) 355 U. S. , 2 L. ed. 2d 223	2, 4

AUTHORITIES CITED.

	Page
30 Am. Jur. Judgments	8
Restatement of the Law of Judgments, § 89	11

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William H. Donner Dated August 6, 1940, and (2) and
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vember 26, 1948,

KATHERINE N. R. DENCKLA,

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Dorothy B. R. Stewart and William Donner Denckla,
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B. R. Stewart, a Mentally Ill Person,

EDWIN D. STEEL, JR., ESQUIRE, Guardian ad Litem for
Joseph Donner Winsor, Curtin Winsor, Jr., and Don-
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BRYN MAWR HOSPITAL, a Pennsylvania Corporation, MIRIAM
V. MOYER, JAMES SMITH, WALTER HAMILTON, DOROTHY
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Trustee for Benedict H. Hanson, and as Trustee Under
Agreements With William H. Donner,

WILLIAM DONNER ROOSEVELT, JOHN STEWART and
BENEDICT H. HANSON,

Respondents.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE
STATE OF DELAWARE

REPLY BRIEF FOR THE PETITIONERS.**I. The Nonresident, Non-Appearing Defendants in the Florida Litigation, Who Were Served by Constructive Process and Given an Opportunity to Appear and be Heard, Were and Are Bound by the Florida Judgment Under the Doctrine Announced in *McGee v. International Life Ins. Co.***

Our main brief was written and filed before this Court rendered its opinion in *McGee v. International Life Ins. Co.* (December 16, 1957) 355 U. S. , 2 L. ed. 2d 223. In our main brief we groped for the doctrine announced in *McGee* and urged the application of such a doctrine on page 19.

The briefs filed by the various respondents were written and filed after *McGee* but they all rely on pre-*McGee* cliches. The respondents urge this Court to conclude that the nonresident defendants who were served by constructive process in the Florida proceedings, but did not appear, are not bound by the Florida judgment even though they were given an opportunity to appear and be heard. This contention is based on the fact that the nonresident defendants were not served personally in Florida, which respondents say prevents the Florida Court from entering an *in personam* judgment; and also because the securities held initially by Wilmington Trust Company under the so-called trust and now by Delaware Trust Company were never physically in Florida to enable the Florida Court to render an *in rem* judgment.

We submit that respondents' position is based on outmoded concepts of jurisdiction and due process. *McGee* recognizes jurisdiction over nonresidents through constructive service where they are given an opportunity to appear and be heard in certain situations where due process is accorded. For the convenience of the Court we set forth the following from the *McGee* Opinion:

"Since *Pennoyer v. Neff*, 95 US 714, 24 L ed 565, this Court has held that the Due Process Clause of the Fourteenth Amendment places some limit on the power of state courts to enter binding judgments against persons not served with process within their boundaries. But just where this line of limitation falls has been the subject of prolific controversy, particularly with respect to foreign corporations. In a continuing process of evolution this Court accepted and then abandoned 'consent', 'doing business', and 'presence' as the standard for measuring the extent of state judicial power over such corporations. See Henderson, *The Position of Foreign Corporations in American Constitutional Law*, ch. V. More recently in *International Shoe Co. v. Washington*, 326 US 310, 90 L ed 95, 66 S Ct 154, 161 ALR 1057, the Court decided that 'due process requires only that in order to subject a defendant to a judgment in personam, if he be not present within the territory of the forum, he have certain minimum contacts with it such that the maintenance of the suit does not offend "traditional notions of fair play and substantial justice."' Id. 326 US at 316.

"Looking back over this long history of litigation a trend is clearly discernable toward expanding the permissible scope of state jurisdiction over foreign corporations and other nonresidents. In part this is attributable to the fundamental transformation of our national economy over the years. Today many commercial transactions touch two or more States and may involve parties separated by the full continent. With this increasing nationalization of commerce has come a great increase in the amount of business conducted by mail across state lines. At the same time modern transportation and communication have made it much less burdensome for a party sued to defend himself in a State where he engages in economic activity."

Paraphrasing the paragraph which follows in the *McGee* Opinion, we say: Turning to this case we think it apparent that the Due Process Clause did not preclude the Florida Court from entering a judgment binding on the respondents and the non-appearing, nonresident Florida defendants who were served by constructive service and were given an opportunity to appear and be heard.

Let us examine the facts in the instant case which show that the Florida defendants had more than minimum contacts with Florida and that the maintenance of the Florida suit did not offend traditional notions of fair play and substantial justice.

The Florida Court was called upon to pass upon the validity of the so-called trust agreement between Mrs. Donner and Wilmington Trust Company and the purported exercises by her of powers of appointment thereunder. The Florida Courts concluded that the so-called trust agreement had been nothing more than an agency agreement. We thus have a situation insofar as Wilmington Trust Company is concerned whereby it, under the Florida rulings, was an agent of Mrs. Donner and as such held certain of her assets, which at the time of her death had a value of \$1,493,629.91 (A104).¹ This trust agreement, whether called an agency agreement or a trust agreement, reserved to her broad powers. Under either the agency or trust concept she was the beneficial owner of the securities held by Wilmington Trust Company. The agreement provided (A21-29):

(a) That the trustee should pay over the net income to her for life.

(b) That she could appoint and change, from time to time, beneficiaries to take upon her death.

1. References to the Transcript of Record will be (A —). References to the transcript of record on the appeal from the Florida Supreme Court, No. 107, will be (F. R. —). Said transcript of record has been supplemented by a stipulation to show that the complaint in the Florida case was mailed to nonresident defendants.

(c) That the principal functions to a trustee could only be exercised with the written consent of an advisor and she reserved the right to change the advisor from time to time.

(d) That she could amend, alter or revoke the agreement in whole or in part at any time or times, including the right to withdraw, in whole or in part, the securities held by the trustee.

(e) That she could, from time to time, remove and change the trustee.

These reserved powers were exercised by her from time to time. She withdrew part of the securities at one time (A103-104). She removed advisors from time to time (A25, 96, 97, 98). She designated different beneficiaries from time to time (A30-46). She was always in a position to remove the trustee and appoint another trustee or to amend or revoke the entire agreement (A21-29).

As Wilmington Trust Company was her agent under the Florida decisions, and under her control through her advisor certainly Wilmington Trust Company had contacts with Florida during the period she was a resident of Florida from 1944 until her death in 1952 (A74, 208; 3). Wilmington Trust Company was obligated to act as she directed and to turn over the net income. The powers of appointment exercised in 1949 and 1950, (A30-34, 35-37) were exercised by her while she was a Florida resident and were delivered to Wilmington Trust Company. Wilmington Trust Company was also named in her will in connection with the direction to the executrix to pay the estate taxes on the trust assets (A15).

Delaware Trust Company was a beneficiary under her will and also under the power of appointment of 1949 (A3, 14-20, 30-34). It was paid \$400,000.00 by Wilmington Trust Company purportedly under the 1949 power of appointment and it is holding that amount in two trusts.

The beneficiaries of the trusts under which Delaware Trust Company is trustee are all residents of Florida and were all named defendants or were represented in the Florida litigation and appeared or were served through constructive process. It is difficult to see how Delaware Trust Company could say that it did not have contacts with Florida when the litigation started because the funds in question were held by it for Florida residents with the obligation to turn over to them the net income as Wilmington Trust Company previously had done (A254-261, 262, 269). Both trust companies have been recipients of fees under the terms of the trust agreements for their services in collecting the income for the Florida beneficiaries. This certainly makes economic contacts with Florida.

The foregoing, we submit, shows more than adequate minimum contacts with Florida and certainly it would not have offended traditional notions of fair play and substantial justice for Wilmington Trust Company and Delaware Trust Company to go to Florida to defend the trusts. In the briefs filed by respondents, they take the position that Wilmington Trust Company and Delaware Trust Company were indispensable parties to the Florida suit and that they owed a duty to defend the trusts. If so, they were derelict in their duty as they should have appeared in Florida to defend the trusts when the validity thereof was challenged. No hardship would have been imposed upon them to do so as the trusts all provide that their expenses are to be paid out of the funds and certainly expenses incurred in Florida to defend the trusts would have come within that category (A21, 255, 262). Furthermore, Mrs. Donner's trust provided in paragraph 12 that Wilmington Trust Company, in addition to its stated compensation, "shall also be entitled to receive a reasonable compensation for any extraordinary services performed by it hereunder" (A27). When the Florida litigation was started, these two corporate trustees had no way of knowing (unless they were in conspiracy with some of their benefi-

aries) that litigation would be started in Delaware to test the validity of the trusts and so, why didn't they defend the trusts in Florida where the beneficiaries were?

The other nonresident, non-appearing parties were likewise beneficiaries under instruments executed by a Florida resident and certainly cannot be heard to say that when the question of the validity of their gifts from a Florida decedent was challenged in a Florida Court that there was no duty on them to defend their gifts. Their contacts with Florida were as donees of a Florida domiciliary.²

II. The Florida Judgment Is Binding on Curtin Winsor, Jr., Who Was and Is a Remote, Contingent Beneficiary.

Much ado about Curtin Winsor, Jr., is made in the brief filed by respondent, Edwin D. Steel, Jr., guardian ad litem, etc., because Curtin Winsor, Jr., one of his wards, was not named in the Florida proceedings. Under the powers of appointment which were stricken down by the Florida Court \$200,000.00 went into each of two trusts. One was for the benefit of Curtin's brother, Joseph Donner, and one was for the benefit of his brother, Donner Hanson, the life beneficiaries. These trusts provide that

2. All of the nonresident, non-appearing defendants were duly served through constructive service. In Mr. Steel's brief, page 14, he stated no attempt had been made to serve Hamilton, but has since withdrawn said statement. Hamilton was named as a defendant and the complaint stated he was a Florida resident. It was later found that he was not a Florida resident and proceedings were then had to serve him by constructive service. This was done separately from the service on the other nonresidents, but is not shown in the Florida Record on Appeal giving rise to Mr. Steel's erroneous belief. We have lodged with the Clerk certified copies of the various documents used in the Florida trial Court showing constructive service of process on Hamilton. Both the Florida Record and this record do show that decrees pro confesso were entered in the Florida proceedings against "all" of the nonresident, non-appearing defendants (F. R. 172; A. 95). This Court must assume that the decrees pro confesso were entered by the Florida Court only after due and proper service of process on said defendants, including Hamilton.

if these life beneficiaries die leaving issue or die having exercised powers of appointment, the issue or the appointees become the remaindermen. Only in the event one or both of Curtin's brothers should die without issue and without having exercised a power of appointment, would he acquire an interest in any part of such estates (A254-261, 262-269). As Curtin was merely a remote, contingent beneficiary and as his two brothers were parties to the Florida litigation, the fact that he was not named is immaterial and the Florida judgment is binding on him as he was and still is in privity with them.

The general principles applicable to this situation which show that a contingent beneficiary such as Curtin need not be named to be bound by a judgment have been stated by this Court. In *Bigelow v. Old Dominion Copper Min. & Smelting Co.*, 225 U. S. 111, 56 L. ed. 1008, this Court said:

"But a judgment not only estops those who are actually parties, but also such persons as were represented by those who were or claim under or in privity with them.

"What is privity? As used when dealing with the estoppel of a judgment, privity denotes mutual or successive relationship to the same right of property. *Litchfield v. Goodnow* (*Litchfield v. Crane*) 123 U. S. 549, 31 L. ed. 199, 8 Sup. Ct. Rep. 210. The ground upon which privies are bound by a judgment, says Prof. Greenleaf, in his work upon Evidence, 13th ed. vol. 1, § 523, is, that they are identified with him in interest; and wherever this identity is found to exist, all are alike concluded. Hence, all privies, whether in estate, in blood, or in law, are estopped from litigating that which is conclusive upon him with whom they are in privity."

30 Am. Jur. Judgments, § 222 and § 225 (now 30A Am. Jur. Judgments, § 396 and § 399) state the rule as follows:

“§ 222. Parties and Privies.—With regard to the persons in whose favor or against whom the doctrine of *res judicata* is applicable, the rule is well settled that a judgment is binding upon all parties to the proceedings in which it is rendered, and their privies. In the strict sense of the term, parties to a judgment in the eye of the law are those only who are named as such in the record, and are properly served with process, or enter their appearance, but the term ‘parties,’ within the contemplation of the rule of *res judicata*, is sometimes extended beyond the mere nominal parties to the record.”

“§ 225. Persons Included as Privies.—There is no generally prevailing definition of privity which can be automatically applied to all cases involving the doctrine of *res judicata*. Who are privies requires careful examination into the circumstances of each case as it arises. In general, it may be said that such privity involves a person so identified in interest with another that he represents the same legal right. It has been declared that privity within the meaning of the doctrine of *res judicata* is privity as it exists in relation to the subject matter of the litigation, and that the rule is to be construed strictly to mean parties claiming under the same title. Under this rule, privity denotes mutual or successive relationship to the same right of property, and there is privity within the meaning of the doctrine of *res judicata* where there is an identity of interest and privity in estate, so that a judgment is binding as to a subsequent grantee, transferee, or lienor of property. This is in harmony with the view that a judgment is binding on privies because they are identified in interest, by their mutual or successive relationship to the same rights of property

which were involved in the original litigation. There are also cases in which it is held that the requisite privity may result from representation, from blood relationship, or from law."

A case squarely in point is that of *Longworth v. Duff*, (Sup. Ct. Ill., 1921) 297 Ill. 479, 130 N. E. 690, where contingent remaindermen had not been named in proceedings involving title to land. The Court said:

"It is a general rule that the interest of the parties not before the court in a proceeding in equity will not be bound by the decree. * * * This general rule applies to all judicial proceedings, but an exception to it is recognized in cases where a party, though not before the court in person, is so far represented by others that his interest receives actual and efficient protection. * * *

"In the present case 25 of the descendants of the devisees mentioned in the will as contingent remaindermen in case of the death of Park Longworth without descendants surviving him were in being who were not made partes to the bill, and in this respect the case differs from that of *Hale v. Hale*, supra. The doctrine of representation, however, is not limited to cases of persons not in being. It was said in *Faulkner v. Davis*, 18 Grat. (Va.) 651, 98 Am. Dec. 698, also quoted in *Hale v. Hale*, supra:

"This rule of representation often applies to living persons, who are allowed to be made parties by representation for reasons of convenience and justice, because their interests will be sufficiently defended by others who are personally parties, and who have motives, both of self-interest and affection, to make such defense, and it is therefore considered unnecessary to make such living persons parties, and, indeed,

improper to do so, and thus compel them to litigate about an interest which may never vest in them." (Emphasis supplied.)

Applying the test of mutuality to this situation, as this Court did in Bigelow, it becomes obvious that Curtin is bound by the Florida judgment. If the Florida Court had decided the issues the other way and had sustained Mrs. Donner's trust and powers of appointment, and then one of Curtin's brothers had died without issue and without having exercised a power of appointment, causing Curtin's contingent interest to become vested, he would have been and now would be in position to urge that the Florida judgment inured to his benefit as a successor in interest to his dead brother and that such judgment could be asserted by him as *res judicata* in any challenge by anyone of his rights. See *Restatement of the Law of Judgments*, § 89 and *Guayaquil & Quito Railway Co. v. Saydam Holding Corp.*, (Sup. Ct. Del., 1957) Terry, 132 A.2d 60.

III. Conclusion.

The action of the Delaware Supreme Court should be reversed.

Respectfully submitted,

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IN THE
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STEWART BORIE and PAULA BROWNING
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Respondents.

**On Writ of Certiorari to the Supreme Court of the State
of Delaware.**

**BRIEF FOR THE RESPONDENT ROBERT B. WALLS,
JR., Guardian ad Litem for Dorothy B. R. Stewart
and William Donner Denckla.**

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*Guardian ad Litem for Dorothy
B. R. Stewart and William
Donner Denckla.*

IN THE
Supreme Court of the United States.

OCTOBER TERM, 1957.

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KATHERINE N. R. DENCKLA,

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B. R. Stewart, a Mentally Ill Person,

EDWIN D. STEEL, JR., ESQUIRE, Guardian ad Litem for
Joseph Donner Winsor, Curtin Winsor, Jr., and Don-
ner Hanson,

BRYN MAWR HOSPITAL, a Pennsylvania Corporation, MIRIAM
V. MOYER, JAMES SMITH, WALTER HAMILTON, DOROTHY
A. DOYLE, RUTH BRENNER and MARY GLACKENS,

LOUISVILLE TRUST COMPANY, a Kentucky Corporation, as
Trustee for Benedict H. Hanson, and as Trustee Under
Agreements With William H. Donner,

WILLIAM DONNER ROOSEVELT, JOHN STEWART and
BENEDICT H. HANSON,

Respondents.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE
STATE OF DELAWARE

**BRIEF FOR THE RESPONDENT ROBERT B. WALLS,
JR., GUARDIAN AD LITEM FOR DOROTHY B. R.
STEWART AND WILLIAM DONNER DENCKLA.**

ARGUMENT.

**1. The Supreme Court of the State of Delaware Erred When
It Refused to Accord Full Faith and Credit to the Judg-
ment of the Supreme Court of the State of Florida.**

This respondent adopts the statement of the case and argument in the brief of the Petitioners.

Only a short additional argument will be made. The Delaware Court, in holding that the Florida Court did not have jurisdiction over the Wilmington Trust Company, the trustee, and Delaware Trust Company, a beneficiary, relied heavily on *Pennoyer v. Neff*, 95 U. S. 714, but failed to take into consideration the modifications on the rules set forth therein by later decisions of this Court. A late modification is found in *McGee v. International Life Insurance Company*, 26 L. W. 4073 (U. S. Supreme Ct., Dec. 16, 1957), a case involving the liability of the insurance company, a Texas corporation, for payment of a death claim under a life insurance policy. The insured was a resident of California, and the beneficiary was also a resident of California. The business transactions prior to the death of the insured had been carried on by mail. Upon the death of the insured, the insurance company refused to pay the death claim. The beneficiary thereupon brought suit in California and service was had on the insurance company by registered mail at its principal place of business in Texas. The insurance company failed to appear and defend. After a judgment had been rendered in favor of the beneficiary and against the insurance company, the judgment was sued on in Texas where the Court refused to

give full faith and credit to the California judgment. This Court granted certiorari, held that the service of process on the insurance company was sufficient for purposes of due process since the suit was based on a contract which had substantial connection with California and reversed the Texas Court. This Court said:

“Since *Pennoyer v. Neff*, 95 U. S. 714, this Court has held that the Due Process Clause of the Fourteenth Amendment places some limit on the power of state courts to enter binding judgments against persons not served with process within their boundaries. But just where this line of limitation falls has been the subject of prolific controversy, particularly with respect to foreign corporations. In a continuing process of evolution this Court accepted and then abandoned ‘consent,’ ‘doing business,’ and ‘presence’ as the standard for measuring the extent of state judicial power over such corporations. See Henderson, *The Position of Foreign Corporations in American Constitutional Law*, c. V. More recently in *International Shoe Co. v. Washington*, 326 U. S. 310, the Court decided that ‘due process requires only that in order to subject a defendant to a judgment *in personam*, if he be not present within the territory of the forum, he have certain minimum contacts with it such that the maintenance of the suit does not offend “traditional notions of fair play and substantial justice.”’ *Id.*, at 316.

“Looking back over this long history of litigation a trend is clearly discernible toward expanding the permissible scope of state jurisdiction over foreign corporations and other nonresidents. In part this is attributable to the fundamental transformation of our national economy over the years. Today many commercial transactions touch two or more States and may involve parties separated by the full continent. With

this increasing nationalization of commerce has come a great increase in the amount of business conducted by mail across state lines. At the same time modern transportation and communication have made it much less burdensome for a party sued to defend himself in a State where he engages in economic activity."

There is no essential difference between the *McGee v. International Life Insurance Company* case and the present case. The present case represents business conducted by mail across state lines. The trust companies of Delaware for profit sought the establishment of trust accounts in Delaware by non-residents. The selling point was a tax advantage. Here, Mrs. Donner, a resident of Pennsylvania, had to pay a personal property tax in Pennsylvania. If she had established an agency account in Delaware, with title to the investments in her, she still would have had to pay the tax. However, if she established a trust fund in Delaware, with title in a trust company there, no tax would have been payable. Hence, the agreement was called a trust agreement, although she retained all the advantages of actual ownership by reserving powers over almost all acts of the trustee. The trust company knew that no beneficiary was a resident of Delaware. All business was carried on by mail across state lines. The trust company knew that when the settlor died the power of appointment under her will would most likely come into play; it knew with almost a certainty that the will would be construed by another state. Because of the large size of the fund, the non-residence of the beneficiaries and the questions likely to arise, the trust company must have foreseen that it would be a party to litigation to determine ownership of the fund.

The first litigation arose in Florida, where most of the beneficiaries resided. Florida was the natural place for it to arise. In addition to the presence of the beneficiaries there, the will was there and the inheritance tax question

was centered there. It is admitted that the two trust companies from Delaware had notice of the suit and had an opportunity to appear and litigate. They had more than minimum contacts with Florida in connection with the trust business in which they were engaged. The maintenance of the Florida suit did not offend "traditional notions of fair play and substantial justice". They should have appeared and defended. The Florida Court had jurisdiction of the trust companies, and that state's judgment should be given full faith and credit by the Delaware Court.

CONCLUSION.

The action of the Delaware Supreme Court should be reversed.

Respectfully submitted,

ROBERT B. WALLS, JR.,

500 Industrial Trust Building,
Wilmington, Delaware,

*Guardian ad Litem for Dorothy
B. R. Stewart and William
Donner Denckla.*

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IN THE

Supreme Court of the United States

October Term, 1957.

No. 117.

DORA STEWART LEWIS, MARY WASHINGTON,
STEWART BORIE and PAULA BROWNING DENCKLA,
Petitioners,

ELIZABETH DONNER HANSON, as Executrix and Trustee
Under the Last Will of Dora Browning Donner, Deceased, et al.,
Respondents.

Brief for Certain Respondents.

CALEB S. LAYTON,
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INDEX TO BRIEF FOR CERTAIN RESPONDENTS.

	Page
I. INTRODUCTION	1
II. COUNTER-STATEMENT OF THE CASE	2
III. ARGUMENT	7
1. The Delaware Supreme Court Properly Refused to Accord Full Faith and Credit to the Judgment of the Florida Supreme Court as to These Respondents	7
2. There Can Be No Error by the Delaware Supreme Court in Holding That the Trust Agreement of March 25, 1935, and the Exercise of the Powers of Appointment Thereunder Were Valid	—11
IV. CONCLUSION	13

TABLE OF CASES AND AUTHORITIES CITED.

	Page
Armstrong v. Armstrong, 350 U. S. 568	9
Baker v. Baker, Eccles & Co., 242 U. S. 394	9
Erie Railroad Co. v. Tompkins, 304 U. S. 64	12
Estin v. Estin, 334 U. S. 541	12
International Shoe Co. v. Washington, 326 U. S. 310	10
Klaxon Co. v. Stentor Electric Mfg. Co., 316 U. S. 685	12
Lines v. Lines, (Pa. 1891, 21 Atl. 809)	10
McArthur v. Scott, 113 U. S. 340 (396)	10
McGee v. International Life Insurance Co., No. 50, October Term, 1957; 26 Law Week 4073	10
Mullane v. Central Hanover Bank & Trust Co., 339 U. S. 306	8
Pennoyer v. Neff, 95 U. S. 714	9, 10
Pink v. A. A. A. Highway Express, 314 U. S. 201	10
Restatement of the Law, Second, Trusts, § 57	5
Riley v. New York Trust Co., 315 U. S. 343	9, 12
Robertson and Kirkham, Jurisdiction of the Supreme Court of the United States, § 58	13
Sadler v. Industrial Trust Company, (Mass. 1954, 97 N. E. (2d) 169	10
United States v. Burnison, 339 U. S. 87	12
Vanderbilt v. Vanderbilt, 354 U. S. 416	9

IN THE
Supreme Court of the United States.

OCTOBER TERM, 1957.

No. 117.

DORA STEWART LEWIS, MARY WASHINGTON STEWART BORIE AND PAULA BROWNING-DENCKLA,
Petitioners,

ELIZABETH DONNER HANSON, AS EXECUTRIX AND TRUSTEE UNDER THE LAST WILL OF DORA BROWNING DONNER, DECEASED,

WILMINGTON TRUST COMPANY, A DELAWARE CORPORATION, AS TRUSTEE UNDER THREE SEPARATE AGREEMENTS, (1) AND (2) WITH WILLIAM H. DONNER DATED MARCH 18, 1932 AND MARCH 19, 1932, AND (3) WITH DORA BROWNING DONNER DATED MARCH 25, 1935,

DELAWARE TRUST COMPANY, A DELAWARE CORPORATION, AS TRUSTEE UNDER THREE SEPARATE AGREEMENTS, (1) WITH WILLIAM H. DONNER DATED AUGUST 6, 1940, AND (2) AND (3) WITH ELIZABETH DONNER HANSON, BOTH DATED NOVEMBER 26, 1948,

KATHERINE N. R. DENCKLA,

ROBERT B. WALLS, JR., ESQUIRE, GUARDIAN AD LITEM FOR DOROTHY B. R. STEWART AND WILLIAM DONNER DENCKLA,

ELWYN L. MIDDLETON, GUARDIAN OF THE PROPERTY OF DOROTHY B. R. STEWART, A MENTALLY ILL PERSON,

EDWIN D. STEEL, JR., ESQUIRE, GUARDIAN AD LITEM FOR JOSEPH DONNER WINSOR, CURTIN WINSOR, JR., AND DONNER HANSON,

BRYN MAWR HOSPITAL, A PENNSYLVANIA CORPORATION, MIRIAM V. MOYER, JAMES SMITH, WALTER HAMILTON, DOROTHY A. DOYLE, RUTH BRENNER AND MARY GLACKENS,

LOUISVILLE TRUST COMPANY, A KENTUCKY CORPORATION, AS TRUSTEE FOR BENEDICT H. HANSON, AND AS TRUSTEE UNDER AGREEMENTS WITH WILLIAM H. DONNER, WILLIAM DONNER ROOSEVELT, JOHN STEWART AND BENEDICT H. HANSON,

Respondents.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE
STATE OF DELAWARE.

BRIEF FOR CERTAIN RESPONDENTS.**I. INTRODUCTION.**

This is a joint brief filed on behalf of two of the respondents, Wilmington Trust Company, a Delaware corporation, as Trustee under an inter-vivos trust agreement dated March 25, 1935, with Dora Browning Donner, and Delaware Trust Company, a Delaware corporation, as Trustee under three separate trust agreements: (1) with William H. Donner, dated August 6, 1940; (2) and (3) with Elizabeth Donner Hanson, both dated November 26, 1948.

II. COUNTER-STATEMENT OF THE CASE.

The trust agreement of 1935 (A21) was executed in Wilmington, Delaware (At that time, Mrs. Donner, the trustor, was a resident of Pennsylvania) and the securities described in the schedule attached to the agreement were transferred and delivered to the Trustee in Delaware and continued there in its possession and was administered wholly in Delaware. The Wilmington Trust Company had no place of business and transacted no business in Florida (A228). The provisions of the trust agreement of 1935 need not be repeated here, but it did provide that the Trustee would hold, manage, invest and reinvest the trust fund, collect the income, and after payment of taxes and expenses, pay over the net income to the trustor, Mrs. Donner, during the term of her natural life. The agreement provided that upon the death of trustor, the Trustee should convey and deliver the trust fund unto such persons and in such manner and amounts "as Trustor shall have appointed by the last instrument in writing which she shall have executed and delivered to Trustee, or failing such instrument, by her Last Will and testament, or in default of any such appointment then unto the then living issue of Trustor, per stirpes and not per capita." It further provided a gift over to Trustor's next of kin in default of appointment or issue (A22).

In 1935 and 1939 (A38-46) the trustor delivered instruments in writing to Trustee purporting to exercise her reserved power of appointment. In 1944, Mrs. Donner, the trustor, became a resident of Florida, where she resided until her death in 1952. On December 3, 1949, as modified on July 5, 1950, the trustor executed and delivered to trustee the instruments in writing of 1949 and 1950, in which she exercised her reserved power of appointment under the trust agreement of 1935 (A30-37). These were the last instruments in writing delivered to the Trustee. Pursuant to said instruments in writing of 1949 and 1950, the trustee, Wilmington Trust Company, transferred and delivered to Delaware Trust Company, Trustee, the sum of \$400,000.00 in cash and securities, and also delivered the amounts appointed to the other appointees designated by the trustor, aggregating \$17,000.00. It is to be noted that the transfer and delivery to Delaware Trust Company, Trustee, of the funds appointed to it, was made in March, 1953, long before the institution of the Florida action in January of 1954. Since the receipt of the funds, Delaware Trust Company has continued to hold them, with various substitutions, under the trusts to which they were appointed, in Delaware. Delaware Trust Company has no place of business and transacts no business outside of Delaware. At the time of the transfer and delivery of the trust funds to Delaware Trust Company, it had no knowledge that any attack would be made on the trust agreement of 1935, or the exercise of the powers of appointment pursuant thereto.

By her will dated December 3, 1949 (A14), Mrs. Donner (in item Fifth thereof) directed her executrix to pay all taxes which by reason of her death might become payable with respect to the property appointed by the exercise of her power of appointment under the trust agreement dated March 25, 1935, and to divide any balance [not so appointed] into two parts, which she then bequeathed.

In other words, the trust agreement of 1935 was executed in Delaware, the trust fund delivered to a Delaware trustee, which held and administered the trust fund in Delaware, and pursuant to the instruments in writing of 1949 and 1950, the Trustee transferred and delivered a substantial part of said trust corpus to Delaware Trust Company, another Delaware resident, as trustee of other trusts held and administered in Delaware. At no time since 1935, have any of the trust funds received by Delaware Trust Company, pursuant to the exercise of the power of appointment, ever been held or administered outside of the State of Delaware (A238).

The Delaware suit for a declaratory judgment was filed on July 28, 1954 (A1). The plaintiff was the executrix and trustee under the will of Dora Browning Donner, who died on November 20, 1952; having been duly appointed and qualified in Florida, the domicile of the testatrix at her death. The testatrix was the same Dora Browning Donner who executed the trust agreement of 1935, as trustor (A21). Prior to the filing of the Delaware suit, on January 22, 1954, certain of the defendants therein, Denekla and Middleton, guardian, filed suit in Florida, against the Delaware plaintiff and certain of the other Delaware defendants, including Wilmington Trust Company and Delaware Trust Company,¹ seeking a declaratory decree purportedly to construe the Florida will but actually to determine that the instruments in writing of 1949 and 1950 (A30-37) were not a valid exercise of powers of appointment under a trust (A71). Wilmington Trust Company and Delaware Trust Company were not served with process in Florida, and said

1. The complaint in the Florida action stated:

"The above named corporate defendants are named as defendants in their individual corporate capacities and as trustees representing various trusts as disclosed by this bill for declaratory decree, in order that they may be bound by any decree entered by this court, not only in their capacities as trustees, but also in their individual corporate capacities." (Record in No. 107 October Term, 1957; A3).

trustees did not appear in the Florida proceedings. The circuit court in Florida decided that it had no jurisdiction over the trust assets or the non-answering defendants Wilmington Trust Company and Delaware Trust Company, who had not been personally served with process, and by its summary final decree entered on January 14, 1955, it dismissed the suit against all the nonappearing defendants including these two defendants, but without considering or applying Delaware law declared that the powers of appointment were testamentary in character, were not executed in the manner required for testamentary instruments in Florida, did not constitute valid inter-vivos trust appointments, and therefore the assets held by Wilmington Trust Company, Trustee under the trust agreement of 1935 passed under Mrs. Donner's will and not pursuant to the instruments in writing of 1949 and 1950 (A83).

On appeal, the Florida Supreme Court not only held that Florida law would be applied to determine the validity of the Delaware trust and the exercise of powers of appointment thereunder (A213), disregarding the judgment of a Delaware court with respect to the same trust upholding its validity and the exercise of the powers of appointment (A212), but reversed the lower court with respect to its finding of lack of jurisdiction over these two respondents (A217). The Florida Supreme Court² held that Florida

2. "With respect to the assertion by the Florida Court that the settlor had divested herself of virtually none of her control over the property, it may be interesting to observe the change made in § 57 of the *Restatement of the Law, Second, 'Trusts'*; which we believe was adopted by the American Law Institute in its May meeting of 1957, as follows:

"Where an interest in the trust property is created in a beneficiary other than the settlor, the disposition is not testamentary and invalid for failure to comply with the requirements of the Statute of Wills merely because the settlor reserves a beneficial life interest or because he reserves in addition a power to revoke the trust in whole or in part, and a power to modify the trust, and a power to control the trustee as to the administration of the trust." (Emphasis ours.)

jurisdiction existed by virtue of the Will (A210) and upon the theory that the exercise of the power of appointment after Mrs. Donner became a resident of Florida constituted a republication of the original trust instrument as if it had been originally executed in Florida (A213); although this is not the law of Delaware (A236). The Delaware Supreme Court determined that full faith and credit was not to be accorded the Florida judgment as a judgment *in rem*, since the *res* was in Delaware, and no personal jurisdiction was acquired over these respondents; also, for lack of personal jurisdiction, the Florida judgment could not bind these respondents *in personam* (A238). The Delaware Supreme Court further held that the Delaware trust was a valid trust and the powers of appointment thereunder were validly exercised (A244).

III. ARGUMENT.

1. The Delaware Supreme Court Properly Refused to Accord Full Faith and Credit to the Judgment of the Florida Supreme Court as to These Respondents.

Petitioners' brief erroneously states that neither the Delaware Supreme Court nor the respondents in this case have questioned the jurisdiction of the Florida Court over the subject matter (Brief, p. 12). The trouble arises from the use of the words "subject matter". As far as the Delaware action was concerned, the "subject matter" of the suit was property which had its only situs in the State of Delaware; viz, the assets of the Delaware trust. With respect to this property located in Delaware, the Delaware Court was required to determine to whom it should be distributed. In reaching such determination, the Delaware Court was required to determine whether the trust which was created and had its situs in Delaware was valid under Delaware law and whether the power of appointment with respect to the trust property had been validly exercised. This determination was made by the Delaware Supreme Court, and in so doing the Delaware Court not only questioned the jurisdiction of the Florida Court with respect to the "subject matter", but found that no such jurisdiction existed (A241). These respondents also deny any jurisdiction of the Florida Court over the "subject matter", by which we refer to the trust assets located in the State of Delaware. As the Delaware Supreme Court said (A238):

"The *res*, over which these parties are contending, consists entirely of corporate securities which at all times since 1935 have been located in Delaware. There has been no seizure of them by any judicial process in Florida, nor has any person or corporation holding

the assets voluntarily brought them before the Florida courts."

The Florida Court assumed to sustain its jurisdiction by virtue of the Will and an assumed republication of the trust instrument by the exercise of the power of appointment (A213), and upon this basis held that it had jurisdiction over the non-resident defendants by substituted service although it was admitted that neither of the Trustees nor any of the trust property had ever been located in Florida.

Petitioners' attempt to justify the Florida Court's jurisdiction over these respondents by constructive service can only be based upon the theory of a proceeding *in rem*. However, since the property in suit was located in Delaware, the only *in rem* proceeding with respect to such property would have to be in Delaware. The case of *Mullane v. Central Hanover Bank & Trust Company*, 339 U. S. 306, 94 L. Ed. 865, quoted by petitioners, clearly holds that it is Delaware and not Florida which has *in rem* jurisdiction with respect to the property here. This Court said:

"It is sufficient to observe that, whatever the technical definition of its chosen procedure, the interest of each state in providing means to close trusts that exist by the grace of its laws and are administered under the supervision of its courts is so insistent and rooted in custom as to establish beyond doubt the right of its courts to determine the interests of all claimants, resident or nonresident, provided its procedure accords full opportunity to appear and be heard."

On the authority of the *Mullane case*, only Delaware had *in rem* jurisdiction to determine the interest of all claimants, and it is no authority to sustain constructive service on these respondents by the Florida courts.

Petitioners further argue that the Delaware Supreme Court applied the "strict doctrine" of *Pennoyer v. Neff*, 95 U. S. 714, 24 L. Ed. 565, thereby implying that there has been some change in the doctrine of that case with respect to its jurisdictional requirements, but no authority is cited to sustain such a contention. On the contrary, this Court has repeatedly followed *Pennoyer v. Neff*. In *Riley v. New York Trust Company*, 315 U. S. 343, 86 L. Ed. 885, this Court said:

"While the Georgia judgment is to have the same faith and credit in Delaware as it does in Georgia, that requirement does not give the Georgia judgment extraterritorial effect upon assets in other states. So far as the assets in Georgia are concerned, the Georgia judgment of probate is *in rem*; so far as it affects personalty beyond the state, it is *in personam* and can bind only the parties thereto or their privies."

In *Baker v. Baker, Eccles & Company*, 242 U. S. 394, this Court said:

"But it is now too well settled to be open to further dispute that the 'full faith and credit' clause and the Act of Congress passed pursuant to it do not entitle a judgment *in personam* to extraterritorial effect if it be made to appear that it was rendered without jurisdiction over the person sought to be bound."

The most recent decisions of this Court also apply the same doctrine, and deny full faith and credit to judgments of state courts rendered with respect to property rights of nonresidents, who were not personally served, concerning property located in another state.

Armstrong v. Armstrong, 350 U. S. 568,

Vanderbilt v. Vanderbilt, 354 U. S. 416.

It is to be borne in mind that the record shows that the Trustees (these respondents) had no contacts what-

soever with the State of Florida. The only limitations upon the rule of *Pennoyer v. Neff*, we submit, are those cases involving status, such as divorce, or in which this Court has found that there have been such contacts by the defendant with the jurisdiction rendering the judgment *in personam* that the suit does not offend "traditional notions of fair play and substantial justice".

International Shoe Co. v. Washington, 326 U. S. 310;

McGee v. International Life Insurance Co., No. 50, October Term, 1957; 26 Law Week, 4073.

It is submitted, furthermore, that Delaware is not required to yield the assertion of her public policy with respect to the validity of the trust agreement and the exercise of the powers of appointment by the determination of the Florida Court based purely upon the theory of a testator's domicile that the trust instrument and the exercise of the power were invalid. *Pink v. A. A. Highway Express*, 314 U. S. 201.

Upon facts similar to those presented here, and unlike Florida, the Courts of other states have recognized their lack of jurisdiction to adjudicate rights with respect to trust property located in a foreign state, when personal service could not be made on the foreign trustee.

Lines v. Lines (Pa. 1891), 21 Atl. 809;

Sadler v. Industrial Trust Company (Mass. 1951), 97 N. E. (2d) 169.

Like the Delaware Supreme Court, these authorities recognized that the trustee is an indispensable party to a suit involving trust property, who is not in privity with certain beneficiaries of the trust. This Court also held that a trustee was a necessary party to an action testing the validity of a trust in *McArthur v. Scott*, 113 U. S. 340 (396).

Finally, petitioners now state (Brief, pp. 22-23) that they are not seeking judgments *in personam* against these two respondents, although on the record before it, the Delaware Supreme Court found that was the relief petitioners sought (A237). At the same time, petitioners assert that Delaware should give such relief as may be necessary to implement the Florida judgment which could only be an *in personam* judgment against these respondents. It is impossible to follow this reasoning. If the petitioners do not seek any relief against these respondents, the judgment of the Delaware Supreme Court should be affirmed; on the other hand, if petitioners seek to enforce the Florida judgment against these respondents, it can only be enforced by treating the Florida judgment as a judgment *in personam* against these respondents, which petitioners concede they have no right to do, and again the Delaware Supreme Court judgment should be affirmed.

2. There Can Be No Error by the Delaware Supreme Court in Holding That the Trust Agreement of March 25, 1935, and the Exercise of the Powers of Appointment Thereunder Were Valid.

Under this point, petitioners apparently contend that the Delaware law is different than the Delaware Supreme Court states it to be. This contention is refuted by the petitioners under their first point, when they state (Brief, p. 21):

“We do not challenge the right of the Delaware Court to announce that Delaware law involving the construction of a trust agreement may differ from Florida law and to make that the law of Delaware, . . .”

In support of this contention, petitioners incorporate by reference arguments made by the appellees in a brief filed in another case. Since these respondents have not been

served nor furnished copies of the briefs-referred to, it is impossible for them to answer such argument.

However, regardless of what such arguments may be, the law applicable thereto is beyond question. The only common law is that of the several states, and each state determines its own common law which is binding on all other courts.

Erie Railroad Co. v. Tompkins, 304 U. S. 64;
Klaxon Co. v. Stentor Electric Mfg. Co., 316 U. S.
685.

It follows that if the Delaware Supreme Court has determined that the trust in question and the exercise of the powers of appointment thereunder are valid under Delaware law, neither this Court nor any other court can determine that the law of Delaware is different in this respect than what the Delaware Supreme Court has stated it to be.

As this Court stated, in *Riley v. New York Trust Company*, *supra*:

"Subject to the Constitutional requirements, Delaware's decisions are based on Delaware jurisprudence. Her sovereignty determines personal and property rights within her territory."

Therefore, this Court can not determine that the Delaware Supreme Court erred in holding that the trust agreement and the exercise of the powers of appointment thereunder were valid under Delaware law.

We furthermore submit that no Federal question is presented in respect of the validity of the trust instrument.

Estin v. Estin, 334 U. S. 541,
United States v. Burnison, 339 U. S. 87.

IV. CONCLUSION.

For the reasons and upon the authorities herein cited, it is submitted that the Delaware Supreme Court was not required to give full faith and credit to the Florida judgment with respect to these respondents, and this appeal should be dismissed for want of a substantial Federal question. *Robertson and Kirkham, Jurisdiction of the Supreme Court of the United States*, § 58. Therefore, the judgment of the Delaware Supreme Court herein should be affirmed.

Respectfully submitted,

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Respondents:

IN THE
Supreme Court of the United States

October Term, 1957.

No. 117.

**DORA STEWART LEWIS, MARY WASHINGTON
STEWART BORIE and PAULA BROWNING DENCKLA,**
Petitioners,

v.

**ELIZABETH DONNER HANSON, as Executrix and Trustee
Under the Last Will of Dora Browning Donner, Deceased, et al.,**
Respondents.

**On Writ of Certiorari to the Supreme Court of the State of
Delaware.**

**BRIEF OF RESPONDENT EDWIN D. STEEL, JR.,
GUARDIAN AD LITEM FOR JOSEPH DONNER
WINSOR, DONNER HANSON AND CURTIN
WINSOR, JR.**

**EDWIN D. STEEL, JR.,
WILLIAM S. MEGONIGAL, JR.,
ANDREW B. KIRKPATRICK, JR.,
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Joseph Donner Winsor, Donner
Hanson and Curtin Winsor, Jr.*

SUBJECT INDEX.

	Page
QUESTIONS PRESENTED	2
STATEMENT OF THE CASE	3
Donner Family Relationships	3
Parties Interested in Invalidating the 1935 Trust and Appointments	4
Parties Interested in Sustaining the 1935 Trust and Appointments	4
SUMMARY OF ARGUMENT	6
ARGUMENT	8
A. The Full Faith and Credit Clause of the Constitution Did Not Require Delaware to Hold Upon the Basis of the Florida Judgment That the 1935 Trust and Ap- pointments Were Invalid	8
1. Delaware Was Not Bound by the Florida Judgment Since Florida Lacked Jurisdiction to Render the Judgment	8
(a) Curtin Winsor, Jr., Who Was Not a Party to the Florida Action or Represented by Others Who Were, Was Not Barred by the Florida Judgment From Litigating in Dela- ware the Question of Florida's Jurisdiction or the Substantive Validity of Its Decision When He Had a Remainder Interest Under Two Trusts to Which \$400,000.00 Was Appointed	8
Curtin Had a Substantial Remainder Interest Under Trusts Nos. 9022 and 9023	8

SUBJECT INDEX (Continued).

	Page
Curtin Was Not Represented by His Mother Who Was Guardian Ad Litem for Joseph and Donner	10
Curtin Was Not Represented in Florida as a Member of a Class	11
Curtin Was Not Bound by the Florida Judgment Under the Doctrine of Virtual Representation	11
Mrs. Hanson, Whom Petitioners Claim Represented Curtin in the Florida Action, Had Financial Interests and Legal Duties Adverse to Curtin	12
(b) Florida Lacked Jurisdiction Over the Persons and Property of Indispensable Parties, viz., Wilmington Trust Company, Trustee Under the 1935 Trust, Appointees Thereunder, and Curtin	13
Florida Lacked Jurisdiction Over Wilmington Trust Company, Trustee Under the 1935 Trust, the Appointees Thereunder and Curtin	14
The Wilmington Trust Company, Trustee, the Appointees, Including Delaware Trust Company, Trustee, and Curtin Were Indispensable Parties to the Florida Litigation	19
In the Absence of Indispensable Parties, Florida Had No Jurisdiction to Render a Judgment Which Was Binding Upon Anyone in Delaware	23

SUBJECT INDEX (Continued).

	Page
2. Assuming <i>Arguendo</i> That Florida Had Jurisdiction to Render the Judgment, Delaware Was Not Bound by It	26
(a) Florida's Jurisdiction (if any) to Render the Judgment Was Only Incidental to the Administration of the Estate of a Florida Decedent	26
(b) The Florida Judgment Was Lacking in Due Process and Was in Derogation of the Full Faith and Credit Clause in That by an Arbitrary Application of Florida Law Florida Destroyed Rights Validly Established Under Delaware Law by a Trust Created and Administered in Delaware Which Had No Significant Relationship to Florida	28
B. The Validity Under Delaware Law of the 1935 Trust and Appointments Is Not Subject to Review by This Court	32
CONCLUSION	33

CASES.

	Page
Aetna Life Insurance Co. v. Dunken, 266 U. S. 389 (1924)	30
Armstrong v. Armstrong, et al., 350 U. S. 568 (1955)	15
Atkinson v. Los Angeles Superior Court, 26 U. S. Law Week 2255 (Nov. 5, 1957)	15
Baker v. Baker, Eccles & Company, 242 U. S. 394 (1917) . .	16
Bank of California Nat. Ass'n, et al. v. Superior Court, 16 Cal. 2d 516, 106 P. 2d 879 (1940)	24, 25
Barney v. Baltimore City, 6 Wall. (U. S.) 280 (1867)	23
Black v. Cutter Laboratories, 351 U. S. 292 (1956)	33
Brinkerhoff-Faris Co. v. Hill, 281 U. S. 673 (1930)	32, 33
Burns Mortgage Co. v. Fried, 292 U. S. 487 (1934)	12
Chambers v. Preston, 137 Tenn. 324, 193 S. W. 109 (1917) . .	11
Chapman v. Texas Co., 80 F. Supp. 15 (E. D. Ill. 1948)	10
Chinnis v. Cobb, et al., 210 N. C. 104, 185 S. E. 638 (1936) . .	21
Demorest v. City Bank Farmers Trust Co., 321 U. S. 36 (1944) .	18
Ernest v. Fleissner, 38 F. Supp. 326 (E. D. Wis. 1941)	23
Estin v. Estin, 334 U. S. 541 (1948)	25, 32, 33
Everett v. Everett, 215 U. S. 203 (1909)	33
Fineman v. Cutler, 273 Pa. 189, 116 A. 819 (1922)	23
Florida Land Rock Phosphate Co. v. Anderson, 50 Fla. 501, 39 So. 392 (1905)	23, 24
Griffin v. Griffin, 327 U. S. 220 (1946) rehearing denied, 328 U. S. 876 (1946)	13
John Hancock Mutual Life Insurance Co. v. Yates, 299 U. S. 178 (1936)	32
Hansberry v. Lee, 311 U. S. 32 (1940)	11
Hartford Accident & Indemnity Co. et al. v. Delta & Pineland Co., 292 U. S. 143 (1934)	29, 30
Hartley v. Langkamp, et al., 243 Pa. 550, 90 Atl. 402 (1914) . .	23, 24
Harvey, et al. v. Fiduciary Trust Co., et al., 299 Mass. 457, 13 N. E. 2d 299 (1938)	21
Henderson v. Usher, 118 Fla. 688, 160 So. 9 (1935)	16, 30
Home Insurance Co. v. Dick, 281 U. S. 397 (1930)	30

CASES (Continued).

	Page
Hymans v. Old Dominion Co., 204 Fed. 681 (D. Me. 1913) . . .	23
International Shoe Co. v. Washington, 326 U. S. 310 (1945) . .	15
Kirby Lumber Corp. v. Southern Lumber Co., 145 Tex. 151, 196 S. W. 2d 387 (1946)	10
Krueding v. Chicago Dock & Canal Co., 285 Ill. 79, 120 N. E. 478 (1918)	24
Kryger v. Wilson, 242 U. S. 171 (1916)	33
Magnolia Petroleum Co. v. Hunt, 320 U. S. 430 (1943)	27
Martinez v. Balbin, — Fla. —, 76 So. 2d 488 (1954)	23, 24
Massachusetts Farmers Defense Committee v. United States, 26 F. Supp. 941 (D. Mass. 1939)	24
McGee v. International Life Insurance Company, 26 U. S. Law Week 4073 (Dec. 16, 1957)	15
Mullane v. Central Hanover Bank & Trust Co., 339 U. S. 306 (1950)	15, 31
Nodine v. Greenfield, 7 Paige (N. Y.) 544, 34 Am. Dec. 363 (1839)	10
O'Hara v. McConnell, et al., 93 U. S. 150 (1876)	21
O'Hara, et al. v. Pittston Co., 186 Va. 323, 42 S. E. 2d 269 (1947)	11
Old Wayne Mutual Life Ass'n. v. McDonough, 204 U. S. 8 (1907)	13
Overby v. Gordon, 177 U. S. 214 (1900)	17
Pennoyer v. Neff, 95 U. S. 714 (1878)	13, 15
Pierce v. Ford Motor Co., 190 F. 2d 910 (9th Cir. 1951), cert. denied 342 U. S. 887 (1951)	12
Pink v. A. A. A. Highway Express, Inc., 314 U. S. 201 (1941) .	32
Powell v. Shepard, 381 Pa. 405, 113 A. 2d 261 (1955)	24
Quong Ham Wah Co. v. Industrial Comm., 255 U. S. 445 (1921)	33
Riley, Executors v. New York Trust Co., Administrator, 315 U. S. 343 (1942)	12, 17, 27, 28
Riverside Mills v. Menefee, 237 U. S. 189 (1915)	13
Shields v. Barrow, 17 How. (U. S.) 130 (1854)	22, 23

CASES (Continued).

	Page
Skaneateles Water Co. v. Skaneateles, 184 U. S. 354 (1902) ..	33
Smith v. Adsit, 23 Wall. (U. S.) 368 (1874)	33
Stovall v. Mayhew, 162 Ky. 283, 172 S. W. 500 (1915)	10
Thompson v. Thompson, 226 U. S. 551 (1913)	25
Thompson v. Whitman, 18 Wall. (U. S.) 157 (1873)	25
Thorman v. Frame, 176 U. S. 350 (1900)	25
Transcontinental & Western Air Inc. v. Farley, et al., 71 F. 2d 288 (2d Cir. 1934)	23
Trueman Fertilizer Co. v. Allison, — Fla. —, 81 So. 2d 734 (1955)	21, 22
United States v. Silliman, 167 F. 2d 607 (3d Cir. 1948)	28
Vanderbilt v. Vanderbilt, 25 U. S. Law Week 4563 (June 24, 1957)	15
Viking Press, Inc. v. Goldman, 38 F. Supp. 1014 (S. D. N. Y. 1941)	23
Watts v. Watts, 151 Kan. 125, 98 P. 2d 125 (1940)	21
Wetmore v. Karrick, 205 U. S. 141 (1907)	13
Weymouth v. Delaware Trust Co., 29 Del. Ch. 1, 45 A. 2d 427 (1946)	21
Williamson v. Jones, 43 W. Va. 562, 27 S. E. 411 (1897)	10
Wilson v. Russ, 17 Fla. 691 (1880)	21, 22
Winn v. Strickland, 34 Fla. 610, 16 So. 606 (1894)	21
Yazoo & M. V. R. R. Co. v. Mullins, 249 U. S. 531 (1919) ..	32

TEXT BOOKS.

	Page
33 Am. Jur., "Life Estates, Remainders, etc." § 180, p. 648	11
34 C. J., "Judgments," § 1435, p. 1013	10
Gray, Rule Against Perpetuities (4th Ed.), § 112(3), § 112.1 . .	9, 10
48 Harv. L. Rev. 995 (1935)	25
Jackson, "Full Faith and Credit—The Lawyer's Clause of the Constitution," 45 Col. L. Rev. 1, 26-34 (1945)	32
3 Paige on Wills (Lifetime Ed.), § 1264, p. 706	10
Restatement, Conflict of Laws, § 299	31
Restatement, Judgments, § 68, Comment "v"	28
Restatement, Judgments, § 71	26
Restatement, Judgments, § 89, Comment "m", p. 443	10
2 Restatement, Property, § 157(c)	10
Scott, "Collateral Estoppel by Judgment", 56 Harv. L. Rev., 1, 18 (1942)	26
2 Scott on Trusts, § 138	21

STATUTES AND RULES.

	Page
§ 365, Title 10, Del. C. 1953	27
Florida Equity Rule 14, now Florida Rule of Civil Procedure 3.6 (31 Fla. Stats. Ann. 168)	11
28 U. S. C., § 1257(3)	32

IN THE
Supreme Court of the United States.

—
OCTOBER TERM, 1957.

—
No. 117.

—
DORA STEWART LEWIS, MARY WASHINGTON
STEWART BORIE AND PAULA BROWNING
DENCKLA,

Petitioners,

v.

ELIZABETH DONNER HANSON, AS EXECUTRIX AND
TRUSTEE UNDER THE LAST WILL OF DORA BROWNING
DONNER, DECEASED, ET AL.,

Respondents.

—
ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE
OF DELAWARE.

—
BRIEF OF RESPONDENT, EDWIN D. STEEL, JR.,
GUARDIAN AD LITEM FOR JOSEPH DONNER
WINSOR, DONNER HANSON AND CURTIN WIN-
SOR, JR.

QUESTIONS PRESENTED.

A. Did The Full Faith and Credit Clause of the Constitution Require Delaware to Hold Upon the Basis of the Florida Judgment That the 1935 Trust and Appointments Were Invalid?

1. Was Delaware bound by the Florida judgment when Florida lacked jurisdiction to render the judgment?

(a) Was Curtin Winsor, Jr., who was not a party to the Florida action or represented by others who were, barred by the Florida judgment from litigating in Delaware the question of Florida's jurisdiction or the substantive validity of its decision when he had a remainder interest under two trusts to which \$400,000.00 was appointed?

(b) Did Florida lack jurisdiction over the persons and the property of indispensable parties, viz., Wilmington Trust Company, trustee under the 1935 trust, the appointees thereunder, and Curtin Winsor, Jr.?

2. Assuming *arguendo* that Florida had jurisdiction to render the judgment, was Delaware bound by it?

(a) Was Florida's jurisdiction (if any) to render the judgment only incidental to the administration of the estate of a Florida decedent?

(b) Was the Florida judgment lacking in due process and in derogation of the full faith and credit clause in that by an arbitrary application of Florida law Florida destroyed rights validly established under Delaware law by a trust created and administered in Delaware which had no significant relationship to Florida?

B. Is the Validity Under Delaware Law of the 1935 Trust and Appointments Subject to Review by This Court?

STATEMENT OF THE CASE.

This brief is filed on behalf of one of the respondents, Edwin D. Steel, Jr., the guardian *ad litem* appointed by the Court of Chancery of Delaware for three infants, Curtin Winsor, Jr.,¹ Joseph Donner Winsor, and Donner Hanson (hereinafter "Curtin", "Joseph" and "Donner"), who were aged 14, 12 and 5, respectively, when the Florida action began (A. 314, R. 2).²

The Donner family relationships, their interests under the 1935 trust and appointments and under Mrs. William H. (Dora Browning) Donner's will, are as follows: /

Donner Family Relationships.

Mrs. Donner, the Florida decedent and settlor of the 1935 *inter vivos* trust, was married twice. Her first husband was J. Norwood Rodgers. By this first marriage Mrs. Donner had two children, Katherine N. Rodgers (Denckla) and Dorothy B. Rodgers (Stewart). Katherine Denckla had two children, William Donner Denckla and Paula Browning Denckla. Dorothy Stewart had two children, Dora Stewart (Lewis) and Mary Washington Stewart (Borie) (A. 111).

1. Robert B. Walls, Jr., was initially appointed guardian *ad litem* for Curtin Winsor, Jr. Steel was later appointed to succeed Walls because Curtin Winsor, Jr.'s interest conflicted with that of Dorothy B. R. Stewart and William Donner Denckla for whom Walls had also been appointed guardian *ad litem*. The stipulation providing for the substitution of Steel, approved by the Delaware Court of Chancery on September 29, 1955, also provided that all pleadings, motions, etc., therefore filed by Steel as guardian *ad litem* for Joseph Donner Winsor should also be deemed filed on behalf of Curtin Winsor, Jr.

2. The abbreviation "A. —" refers to the Delaware Record; "R. —" refers to the Florida Record in No. 107, October Term 1957; "Pet. —" refers to the Petition for Certiorari; and "PB —" refers to petitioners' brief.

When Mr. Rodgers died his widow married William H. Donner. By this second marriage Mrs. Donner had three children. Only one, Elizabeth (Hanson), is here involved. Mrs. Hanson was married three times. By her first husband she had one child, William Donner Roosevelt; by her second husband she had two children, Curtin Winsor, Jr., and Joseph Donner Winsor; and by her third husband she had one child, Donner Hanson (A. 111-112).

*Parties Interested in Invalidating
the 1935 Trust and Appointments.*

If the 1935 *inter vivos* trust and appointments are invalid the trust property passes under the residuary clause of Mrs. Donner's will (A. 15).

Under Mrs. Donner's will the residuary legatees are two trusts. One is Trust No. 8555 (Delaware Trust Company, Trustee) under which Mrs. Denckla is the life beneficiary. The other is the Hanson trust (Mrs. Hanson, Trustee) under which Mrs. Stewart, an incompetent, is the life beneficiary, and Trust No. 8555 is the remainderman (A. 299, 15). Petitioners have remainder interests under Trust No. 8555 and therefore desire to invalidate the 1935 trust and appointments (A. 271-272).

*Parties Interested in Sustaining
the 1935 Trust and Appointments.*

Trusts Nos. 9022 and 9023 are each appointees of \$200,000.00 under the 1935 trust (A. 32-33). Joseph is a life beneficiary under Trust No. 9022 with the right to receive one-fourth of the principal at age 25 years; and Donner has a similar interest under Trust No. 9023. Curtin has a substantial remainder interest under each trust (A. 254-261, 262-269). The three infants for whom the respondent Steel is guardian *ad litem* therefore desire to sustain the 1935 trust and appointments.

At Mrs. Donner's death the corpus of the 1935 trust amounted to \$1,490,000.00 (A. 104). Of this amount Mrs. Donner appointed \$10,000.00 to the Bryn Mawr Hospital, \$7,000.00 to six employees and \$200,000.00 to each of Trusts Nos. 9022 and 9023³ (A. 31, 93). The effect of the appointment to Trusts Nos. 9022 and 9023 was to close the disparity between the amount of the trust interests of Joseph and Donner and the larger interests of their brothers and the four grandchildren of Mrs. Donner by her first marriage under trusts created prior to the time when Joseph and Donner were born (A. 298). The balance of the corpus of the 1935 trust amounting to \$1,000,000.00 was appointed to Mrs. Hanson as executrix under Mrs. Donner's will and is included in Mrs. Donner's residuary estate (A. 33). By the terms of Mrs. Donner's will the residuary estate is distributable to two trusts under which Mrs. Denokla and Mrs. Stewart, children of Mrs. Donner by her first husband, are life beneficiaries, and petitioners have remainder interests (A. 15, 270). There is no dispute concerning the right of Mrs. Donner's estate to receive this \$1,000,000.00.

At issue, then, is the disposition of the \$417,000.00. Delaware held that the appointees under the 1935 trust were entitled to it. Florida held that the appointments were invalid and that the appointed property should be paid over to Mrs. Hanson as executrix of Mrs. Donner's estate to be administered in Florida. Both decisions, therefore, purport to determine the ownership of the \$417,000.00 and rights of possession with respect to it.

Under the Delaware decision the clearly expressed wishes of Mrs. Donner to provide for her grandchildren, Joseph and Donner, are carried out; under the Florida decision they are defeated.

³ These were *inter vivos* trusts previously created by Mrs. Hanson, (a daughter of Mrs. Donner by her second marriage) for the benefit of Joseph, Donner, Curtin and others (A. 254-269).

SUMMARY OF ARGUMENT.

A judgment rendered by a court which lacks jurisdiction over the persons of indispensable parties in an action *in personam* or over the property of indispensable parties in an action *in rem* or *quasi in rem* is void. It is entitled to no faith or credit in a later action even as to parties over whose persons or property the court otherwise had jurisdiction.

While certain aspects of Florida's jurisdiction was challenged and upheld in Florida, Curtin was not bound by the adjudication. Curtin had a substantial remainder interest in Trusts Nos. 9022 and 9023 to which \$400,000.00 had been appointed. Yet he was not a party to the Florida action, nor was he represented by persons who were. None of the trust property in which Curtin had an interest was subject to the jurisdiction of the Florida court. Basic considerations of due process prevent Curtin from being bound by the Florida judgment.

The effect of the Florida judgment was to invalidate the 1935 trust and appointments and to require the trust corpus to be transferred to Florida for administration by Mrs. Donner's executrix. To such an adjudication Wilmington Trust Company, trustee under the 1935 trust, the appointees thereunder, and Curtin were indispensable parties. None of these persons or corporations were personally subject to the jurisdiction of the Florida court and none of the trust property was located within the State of Florida. The fact that Florida was administering the estate of Mrs. Donner, the settlor of the trust who had exercised powers of appointment while residing in Florida, did not establish a *res* in Florida so as to subject Wilmington Trust Company, trustee, the appointees, or Curtin to Florida's jurisdiction. Since the court lacked jurisdiction over indispensable parties its judgment was void and entitled to no recognition as to anyone anywhere.

But assuming *arguendo* that Florida did have jurisdiction to render its judgment, still the judgment was not entitled to full faith and credit in Delaware.

In the first place, Florida held that it had no *direct* jurisdiction to invalidate the 1935 trust and appointments. It found power to do so solely because Mrs. Donner's will, which was probated in Florida, disposed of property over which it was asserted that Mrs. Donner had powers of appointment which she had not effectively exercised. Thus, Florida's jurisdiction (if any there was) to pass upon the validity of the 1935 trust and appointments was not direct, but existed only as an incident to Florida's jurisdiction to administer the estate of Mrs. Donner who was a Florida resident. This circumstance alone prevented the Florida judgment from having any binding effect in Delaware.

Then too, the Florida judgment was based upon an arbitrary and erroneous choice of law. By applying Florida law to destroy a Delaware trust which was valid under Delaware law and which had no significant relationship to Florida, Florida rendered a judgment which was lacking in due process and in derogation of the full faith and credit clause of the Constitution, which required Florida to apply Delaware law. The Florida judgment, therefore, was not entitled to full faith and credit in Delaware.

The question whether Delaware correctly held that the 1935 trusts and appointments were valid as a matter of Delaware state law presents no issue for review by this Court.

ARGUMENT.

A. The Full Faith and Credit Clause of the Constitution Did Not Require Delaware to Hold Upon the Basis of the Florida Judgment That the 1935 Trust and Appointments Were Invalid.

1. DELAWARE WAS NOT BOUND BY THE FLORIDA JUDGMENT SINCE FLORIDA LACKED JURISDICTION TO RENDER THE JUDGMENT.

(a) CURTIN WINSOR, JR., WHO WAS NOT A PARTY TO THE FLORIDA ACTION OR REPRESENTED BY OTHERS WHO WERE, WAS NOT BARRED BY THE FLORIDA JUDGMENT FROM LITIGATING IN DELAWARE THE QUESTION OF FLORIDA'S JURISDICTION OR THE SUBSTANTIVE VALIDITY OF ITS DECISION WHEN HE HAD A REMAINDER INTEREST UNDER TWO TRUSTS TO WHICH \$400,000.00 WAS APPOINTED.

Curtin was not named as a party in Florida. Nothing decided by Florida can have any conclusory effect upon his rights.

Petitioners dispute this and assert (1) Curtin was a "remote, contingent beneficiary" under Trusts Nos. 9022 and 9023, (2) he was represented by his mother who was guardian *ad litem* for the primary beneficiaries, and (3) he was also a member of a class represented in the Florida litigation (Pet. p. 7, fn. 5; PB. 6, fn. 5). None of these contentions is sound.

Curtin Had a Substantial Remainder Interest Under Trusts Nos. 9022 and 9023.

Joseph is the life beneficiary of Trust 9022 and Donner is the life beneficiary of Trust 9023, to each of which \$200,000.00 of the 1935 trust corpus was appointed. Upon the death of the life beneficiary of each trust, and in the

absence of appointment by the life beneficiary or the survival of his issue, the corpus of each trust is distributable to the then living children of the settlor, Mrs. Hanson (A. 255-256, 263).

When Trusts Nos. 9022 and 9023 were created and at all times since, Mrs. Hanson has had four children, Joseph and Donner, the life beneficiaries, and William Donner Roosevelt and Curtin Winsor, Jr.

When the Florida litigation was begun Joseph was twelve and Donner was five. Neither had issue (A. 314); and neither had exercised their powers of appointment (A. 313).

It therefore follows that if either Joseph or Donner had died at any time after the receipt of the \$400,000.00 by Trusts Nos. 9022 and 9023, the corpus of the trust would have passed to Mrs. Hanson's three surviving children of which Curtin is one.

The interest which Curtin had under both trusts was and is, therefore, a substantial remainder interest. Petitioners' characterization of Curtin's interest as "remote" and "contingent" could be applied with equal accuracy to petitioners' own interests under the residuary clause of Mrs. Donner's will. Since the interests of petitioners was sufficiently substantial to give them a standing to be heard on the validity of the 1935 trust and appointments, it is odd that petitioners should seek to deny Curtin a similar right.

Curtin's right to be heard prior to the entry of a judgment barring him of his rights under Trusts Nos. 9022 and 9023 does not depend upon the legal label which is affixed to his interest; it is enough that he has an interest and that it is substantial. Actually Curtin's interest was a vested remainder interest. Its vested character is not negatived because Curtin's right to take upon the death of the life beneficiary can be later divested by the exercise of the power of appointment by the life beneficiary or by the survival of the life beneficiary by his issue. Gray, RULE

AGAINST PERPETUITIES (4th Ed.), § 112(3), § 112.1; 3 PAIGE ON WILLS (Lifetime Ed.), § 1264, p. 706; 2 RESTATEMENT, PROPERTY, § 157(c), particularly Illustrations 3 and 12, and Comments "o-s", pp. 554-560.

Curtin Was Not Represented by His Mother Who Was Guardian Ad Litem for Joseph and Donner.

The Florida court appointed Mrs. Hanson guardian *ad litem* for her children, Joseph and Donner (R. 39). As life beneficiaries under Delaware Trusts Nos. 9022 and 9023 the interest of Joseph and Donner—like that of Curtin—was in upholding the validity of the appointments to Trusts Nos. 9022 and 9023. But this identity of interest in the outcome of the Florida suit did not result in Curtin being bound by the Florida judgment. A judgment against a life tenant will not bind a remainderman who is not a party to the litigation. *Nodine v. Greenfield*, 7 Paige (N. Y.) 544, 34 Am. Dec. 363 (1839); *Williamson v. Jones*, 43 W. Va. 562, 27 S. E. 411 (1897); *Stovall v. Mayhew*, 162 Ky. 283, 172 S. W. 500 (1915); Cf. RESTATEMENT, JUDGMENTS, § 89, Comment "m", p. 443.

Similarly, the jurisdiction of the Florida court over Donner who was a co-remainderman with Curtin under Trust No. 9022 and over Joseph who was a co-remainderman with Curtin under Trust No. 9023 did not have the effect of subjecting Curtin to the judgment. Curtin was not in privity with Joseph or Donner for his estate did not derive from them. Their relationship as co-remaindermen is analogous to that of co-tenants; and a co-tenant not a party to litigation will not be bound by a judgment against other co-tenants who are. *Kirby Lumber Corp. v. Southern Lumber Co.*, 145 Tex. 151, 196 S. W. 2d 387 (1946); *Chapman v. Texas Co.*, 80 F. Supp. 15 (E.D. Ill. 1948); RESTATEMENT, JUDGMENTS, § 89, Comment "m", p. 443; 34 C. J., "Judgments," § 1435, p. 1013.

Curtin Was Not Represented in Florida as a Member of a Class.

To begin with the Florida suit was not pleaded as a class action. See former Florida Equity Rule 14, now Florida Rule of Civil Procedure 3.6 (31 *Fla. Stats. Ann.* 168). Since the Florida action was not instituted and conducted as a class action it cannot be transformed into a class action after judgment. *O'Hara, et al. v. Pittston Co.*, 186 Va. 325, 42 S. E. 2d 269, 279 (1947).

Furthermore, the action in Florida could not properly have been a class action. The only class to which Curtin arguably belonged was that of remaindermen under Trusts Nos. 9022 and 9023. Since, however, there were only three living persons with similar interests under each of the trusts, the membership of the "class" was not so numerous as to make it impractical to join Curtin as a party. The difficulty of joining as parties all members of a class because of the number of the membership is a condition to their valid omission in Florida (see former Florida Equity Rule 14) as it is elsewhere. See *Hansberry v. Lee*, 311 U. S. 32, 41 (1940).

Curtin Was Not Bound by the Florida Judgment Under the Doctrine of Virtual Representation.

The doctrine of virtual representation has application only when it is impossible or impractical to join as a party a person having a future interest in property, either because his identity is not ascertainable, or he is not *in esse*, or he is beyond the jurisdiction of the court. Curtin was not such a person. At all times pertinent Curtin was living and resided in Florida with his mother (A. 314). The doctrine of virtual representation is inapplicable to a person within the jurisdiction who is entitled to notice and has a right to be heard. *Chambers v. Preston*, 137 Tenn. 324, 193 S. W. 109, 112 (1917); 33 *Am. Jur.*, "Life Estates, Remainders, etc." § 180, p. 648.

Mrs. Hanson, Whom Petitioners Claim Represented Curtin in the Florida Action, Had Financial Interests and Legal Duties Adverse to Curtin.

Lastly, Mrs. Hanson, whom petitioners assert represented Curtin, actually had adverse interests to his. As executrix, Mrs. Hanson stood to obtain more in commissions if the 1935 trust were struck down and Mrs. Donner's estate correspondingly increased (A. 171). Under certain contingencies Mrs. Hanson was likewise a beneficiary under Trust No. 8555, one of the residuary legatees under Mrs. Donner's will (A. 272). Moreover, Mrs. Hanson, as testamentary trustee of one-half of Mrs. Donner's residuary estate, was under a legal duty to do her utmost to defeat the 1935 trust and thereby enlarge the corpus of the testamentary trust. While it is not suggested that Mrs. Hanson has not done her best as guardian *ad litem* for Joseph and Donner to protect their interests in accordance with the manifest intentions of the settlor-testatrix, the fact that both personally and as a fiduciary Mrs. Hanson's interests were adverse to Curtin's should as a matter of public policy, if not Constitutional due process necessity, prevent Curtin from being bound by anything that Mrs. Hanson did as a representative of Joseph and Donner. See *Riley, Executors v. New York Trust Co. Administrator, et al.*, 315 U. S. 343, 356 (1942) (concurring opinion).

No Florida statutory or decisional law pertinent to the question of Curtin's vicarious representation in the Florida litigation has been found. This Court is therefore warranted in accepting the above cited general authorities as an expression of what the Florida law is. *Burns Mortgage Co. v. Fried*, 292 U. S. 487, 496 (1934); *Pierce v. Ford Motor Co.*, 190 F. 2d 910, 915 (4th Cir. 1951), cert. denied 342 U. S. 887 (1951). Under the authorities generally it is clear that Curtin was neither a party nor represented by others who were parties to the Florida litigation.

Without violating elementary "due process" concepts Curtin cannot be held to be bound by the Florida judgment. So far as Curtin's rights are concerned the Florida judgment was without validity in Florida and was entitled to no credit in Delaware. *Pennoyer v. Neff*, 95 U. S. 714 (1878); *Old Wayne Mutual Life Ass'n. v. McDonough*, 204 U. S. 8, 23 (1907); *Wetmore v. Karrick*, 205 U. S. 141, 149 (1907); *Riverside Mills v. Menefee*, 237 U. S. 189, 196-197 (1915); *Griffin v. Griffin*, 327 U. S. 220, 228-229 (1946) rehearing denied, 328 U. S. 876 (1946).

(b) FLORIDA LACKED JURISDICTION OVER THE PERSONS AND PROPERTY OF INDISPENSABLE PARTIES, VIZ., WILMINGTON TRUST COMPANY, TRUSTEE UNDER THE 1935 TRUST, APPOINTEES THEREUNDER, AND CURTIN.

By the exercise of Mrs. Donner's power of appointment under the 1935 trust, the following persons and corporations became entitled to the amounts set opposite their respective names (A. 9, 10, 31-33, 36):

Miriam V. Moyer	\$ 2,000.00
Dorothy Doyle	1,000.00
Mary Glackens	1,000.00
Walter Hamilton	1,000.00
James Smith	1,000.00
Ruth Brenner	1,000.00
Bryn Mawr Hospital	10,000.00
Delaware Trust Company, Trustee under Trust No. 9022 for Joseph and others	200,000.00
Delaware Trust Company, Trustee under Trust No. 9023 for Donner and others	200,000.00
Total	\$417,000.00

At issue in Florida was the validity of the rights of the appointees of \$417,000.00.

Florida Lacked Jurisdiction Over Wilmington Trust Company, Trustee Under the 1935 Trust, the Appointees Thereunder and Curtin.

Three of the appointees, Doyle, Brenner and Glackens, were not even named parties (A. 70). Nor was Curtin notwithstanding his substantial remainder interest under Trusts Nos. 9022 and 9023 (A. 70). Hamilton, another appointee, was named as a party but no attempt was made to serve him (R. 37-39). Consequently, Florida did not even purport to acquire jurisdiction over either the persons or the property of these persons.

Although the Wilmington Trust Company, and the other appointees were named parties in Florida, all of them, with the possible exception of Hamilton, were non-residents of Florida (A. 71-73).⁴ Neither Wilmington Trust Company nor Delaware Trust Company as trustee under Trusts Nos. 9022 and 9023 had an office or other place of business outside of Delaware (A. 94, 253). Because of the impossibility of making personal service in Florida upon them or the other appointees, service was purportedly made by publication and by mail under Chapter 48, Fla. St. (1953) 48.01 and 48.02, Vol. 1, p. 233 (see Appellants' brief in October Term 1957, No. 107, pp. 4-5). None of the non-residents appeared in response to the notice.

The trial court in Florida held that it had "no jurisdiction over the non-answering defendants." The court held that the service by publication and by mail was insufficient to subject their property to the jurisdiction of the court since "the trust assets . . . are in Delaware" (R. 110-111).

On cross appeal the Florida Supreme Court held that Florida had jurisdiction *over the persons* of the absent defendants (R. 191, 192). Petitioners make the same assertion (PB. 19). Florida's determination was obviously at

4. The complaint alleges that Hamilton was a Florida resident (A. 73). The answer of Mrs. Hanson denies this (R. 48).

odds with the basic Constitutional limitations upon the jurisdiction of a State court. *Pennoyer v. Neff*, 95 U. S. 714 (1878); *Armstrong v. Armstrong, et al.*, 350 U. S. 568, 576 (1955); *Vanderbilt v. Vanderbilt*, 25 U. S. LAW WEEK 4563, 4564 (June 24, 1957).

Florida had no conceivable jurisdictional basis for making an adjudication concerning these non-residents. The Florida action was not a case where the Florida court had a basis for jurisdiction over non-residents because it was adjudicating interests of non-residents in property located in Florida. See *Pennoyer v. Neff*, 95 U. S. 714, 723-724, 730-733 (1878). Cf. *Mullane v. Central Hanover Bank & Trust Co.*, 339 U. S. 306 (1950). Nor was it a case where the Florida court had a basis for jurisdiction because it was making an adjudication concerning the obligation to non-residents of an obligor personally subject to its process. See *Atkinson v. Los Angeles Superior Court*, 26 U. S. LAW WEEK 2255 (Nov. 5, 1957). Neither petitioners nor the Florida court have suggested that Florida had either of these conventional bases for acquiring jurisdiction by substituted service.

Moreover, the Florida case was not one where its courts could have acquired personal jurisdiction by substituted service because the non-residents were "doing business" in Florida, or were "present" in Florida, or were engaging "in economic activity" in Florida, *McGee v. International Life Insurance Company*, 26 U. S. LAW WEEK 4073 (Dec. 16, 1957), or had the "minimum contacts" with Florida required by due process, *International Shoe Co. v. Washington*, 326 U. S. 310, 316 (1945). These non-residents had no cognizable contacts with Florida whatsoever. See pp. 30-31, *infra*. They could not be personally subject to the jurisdiction of its courts if today there is any limit to the reach of state process.

And the Florida Supreme Court itself did not regard any activities of these non-residents as establishing contacts giving it a basis for personal jurisdiction. Rather,

the Florida court premised its finding of personal jurisdiction on the single theory that "because substantive jurisdiction existed in the Florida court by virtue of construction of a will" of a Florida decedent Florida had power to adjudicate claims asserted on behalf of the decedent's estate against property and persons located outside of Florida (R. 191). It relied upon *Henderson v. Usher*, 118 Fla. 688, 160 So. 9 (1935) (R. 191-192). There the court said that when an executor comes into court seeking the construction of a will "the will is the res" (160 So. at p. 10); and that the out of state intangible assets dealt with by the will "are constructively brought . . . into the court" (160 So. at p. 11).

Apart from the aspects of *Henderson* which distinguish it from the case at bar,⁵ its *rationale* is in flat conflict with the Constitutional teachings of this court. It is now settled that, although a judgment of probate may be *in rem*, this is true only with respect to assets located in the state of probate. So far as the judgment of probate affects personalty beyond the state, it is *in personam* and can only bind parties to the probate proceedings or their privies.

Thus, in *Baker v. Baker, Eccles & Company*, 242 U. S. 394 (1917), the question was whether a Tennessee judgment, adjudicating that an intestate was domiciled in Tennessee and hence the devolution of his personal intangible property located in Kentucky was governed by Tennessee law, was entitled to full faith and credit as an *in personam* judgment against a resident of Kentucky who had been served only by publication in the Tennessee action. This Court held that it was not, for the reason that the judgment "was rendered without jurisdiction over the person sought to be bound" (242 U. S. at p. 401). This Court said that the Tennessee judgment could not conclusively establish rights in the Kentucky assets as against the Kentucky resi-

5. Certain of these features are discussed by the Delaware Supreme Court (A. 239-240) and at pages 18-19 of Appellants' Brief in the companion case October Term 1957—No. 107.

dent because the latter "was not served with process and did not appear" in the Tennessee action (242 U. S. at p. 404).

Moreover, in *Riley, Executors v. New York Trust Co., Administrator*, 315 U. S. 343 (1942) the Court said at p. 353:

"So far as the assets in Georgia are concerned, the Georgia judgment of probate is *in rem*; so far as it affects personalty beyond the state, it is *in personam* and can bind only parties thereto or their privies."

And in *Overby v. Gordon*, 177 U. S. 214, 223 (1900), the Court said with respect to the grant of letters of administration in Georgia:

"* * * the adjudication of a grant of letters would have no binding probative force in contests respecting property lying outside of the territorial dominion of the state of Georgia. * * *"

Presence of the property or the interested persons is thus the jurisdictional prerequisite for such probate adjudications, as well as for all other property adjudications. Just because of that, ancillary administration is an American legal institution.

But even if a domiciliary court were to be given the Constitutional power to make adjudications concerning the devolution of property interests of its domiciliaries in the absence of the property and other interested persons, that would still not confer jurisdiction upon the Florida court in this instance. *Here, the Florida court did not merely adjudicate concerning the devolution of property of its domiciliary; it made the distinct determination that property located elsewhere was not the property of non-residents but was the property of its domiciliary and thus constituted a part of the domiciliary's estate.* That is a different question, one that certainly necessitates the presence in Florida of either the property or the other claimants to

the property. Otherwise, Florida could Constitutionally adjudicate claims asserted by or on behalf of its domiciliaries to all property located outside of Florida against all persons located outside of Florida on the ground that it was determining what property constituted the estates of its domiciliaries. Florida cannot thus extend its power and divest non-resident claimants and creditors to property located in other states. That would authorize national service of state process whenever the forum was the domicile of the decedent under whom the plaintiff claimed. Certainly our Constitution does not permit that.

Admittedly, Florida has an interest in the economic status of its domiciliaries, dead and alive. Consequently, it has power to tax them and certain of the property they own and income they earn. When they die, its law is applicable to determine the devolution of certain of that property. See *Demorest v. City Bank Farmers Trust Co.*, 321 U. S. 36, 48 (1944). But this interest does not give Florida power to determine the distinct question whether its domiciliary has an interest superior to others beyond its borders in property beyond its borders, with no cognizable contact with the state. Florida's interest in the foreign property, in the taxation of it and in the devolution of it, cannot arise until it is first determined that its domiciliary or his estate owns it. To determine this question, either the property or the other interested persons must be before the Florida court. Constitutionally, nothing less will do.

Petitioners point out that Mrs. Hanson as executrix filed an inventory in Florida which included the assets constituting the corpus of the 1935 trust (PB. 6, 9). Petitioners suggest—although they do not argue the point directly—that in some way the filing of this inventory subjected the Delaware assets to the jurisdiction of the Florida court. Actually, the Delaware assets were included in the inventory through inadvertence, and a corrected inventory

omitting the Delaware assets was subsequently filed (R. 74-90). The Florida trial court expressly rejected the contention that the filing of the inventory gave Florida jurisdiction over the Delaware assets (R. 110-111); and the Supreme Court of Florida apparently deemed the point unworthy of comment. In any event, it is not perceivable how the act of Mrs. Hanson, as executrix, can have any binding effect upon the rights of Wilmington Trust Company, the appointees of the trust assets, or Curtin.

Manifestly, Florida had no jurisdictional basis for entering a judgment either *in personam* or *in rem* against the non-resident defendants, or against Curtin who was not a party to the action.

The Wilmington Trust Company, Trustee, the Appointees, Including Delaware Trust Company, Trustee, and Curtin Were Indispensable Parties to the Florida Litigation.

Florida found it unnecessary to decide whether Wilmington Trust Company and the appointees were "necessary" parties. This is because of its erroneous conclusion that it had in fact acquired jurisdiction over them (R. 192).

When regard is had to the purpose of the Florida action and the scope of the Florida adjudication the indispensability of the non-residents as parties is apparent.

The complaint in Florida prayed that the Court determine (A. 82):

"* * * what portion of the trust property involved herein passes under the residuary clause of the will of the decedent."

The Florida complaint alleged that if the appointments were invalid (A. 81):

"* * * certain property of the trust become assets of the residuary estate of the decedent, * * *"

and that (A. 81):

“* * * it is important to capture the same for the benefit of the estate prior to the discharge of the defendant executrix * * *”

After holding that the appointments were invalid the judgment of the Florida trial court stated (A. 84):

“* * * the executrix should receive the assets and dispose of them agreeable to the will under which she was appointed.”

and that (A. 84-85):

“* * * the assets held under the provisions of the trust agreement dated March 25, 1935, between the decedent, Dora Browning Donner, and Wilmington Trust Company, as Trustee, and additions thereto, passed under the will of Dora Browning Donner, dated December 3, 1949, and disposition thereof is determined by the residuary clause of the will, * * *”

The judgment of the trial court was affirmed by the Supreme Court of Florida (A. 217-218).

The net of the Florida decision was an adjudication that the trust and appointments were invalid, that the Wilmington Trust Company could not properly transfer the \$417,000.00 to the appointees, that Delaware Trust Company was not entitled to the \$400,000.00 appointed to it under Trusts Nos. 9022 and 9023, and that Mrs. Hanson, as Mrs. Donner's executrix, was entitled to the trust assets to administer in Florida. Yet all of this was purportedly adjudged without Florida having before it either the persons or the property of the Wilmington Trust Company, the appointees, or Curtin.

Petitioners erroneously argue that the Wilmington Trust Company, trustee, and Delaware Trust Company, trustee, were merely stakeholders (PB. 19). Wilmington Trust Company was more than that. It was a fiduciary charged with a duty to defend the existence of its trust.

2 *Scott on Trusts* § 138; *O'Hara v. McConnell, et al.*, assignees, 93 U. S. 150, 152 (1876); *Chinnis v. Cobb, et al.*, 210 N. C. 104, 185 S. E. 638, 642 (1936). Compare *Weymouth v. Delaware Trust Co.*; 29 Del. Ch. 1, 45 A. 2d 427 (1946) wherein it was held that a trustee has a duty to defend the existence of his trust even against an attempt by the settlor and the sole beneficiary to defeat it.

And Delaware Trust Company was under no less a duty to protect the corpus of Trusts Nos. 9022 and 9023. Joseph and Donner, the life beneficiaries who were before the Florida Court, were not the only persons interested in these two trusts. Curtin and William Donner Roosevelt each had remainder interests under the trusts (*supra*, p. 9). Delaware Trust Company was obligated by law to protect the rights of these remaindermen. *Chinnis v. Cobb, et al.*, 210 N. C. 104, 185 S. E. 638 (1936); *Wilson v. Russ*, 17 Fla. 691, 697 (1880); *Winn v. Strickland*, 34 Fla. 610, 16 So. 606, 613 (1894). So also was it duty bound to protect the potential interests which unborn children of Joseph and Donner had in the corpus of Trusts 9022 and 9023. *Harvey, et al. v. Fiduciary Trust Co., et al.*, 299 Mass. 457, 13 N. E. 2d 299, 304 (1938).

The indispensability of a trustee as a party to litigation involving the existence of the trust or affecting the trust estate is recognized everywhere. In addition to the cases cited at pp. 20-22 of the brief filed by appellants in the companion case—October term, 1957, No. 107—*Watts v. Watts*, 151 Kan. 125, 98 P. 2d 125 (1940); *O'Hara v. McConnell, et al.*, 93 U. S. 150, 154 (1876) and the decision of the Delaware Supreme Court (A. 243) in the case at bar likewise support this view. So also do decisions of the Supreme Court of Florida. *Wilson v. Russ*, 17 Fla. 691, 697 (1880); *Winn v. Strickland*, 34 Fla. 610, 16 So. 606, 613 (1894); and *Trueman Fertilizer Co. v. Allison*, — Fla. —, 81 So. 2d 734, 738 (1955). In the latter case the Florida Supreme Court sitting *en banc* said:

"There is, of course, the general rule that a trustee is an indispensable party in all proceedings affecting the estate. *Winn v. Strickland*, 34 Fla. 610, 16 So. 606; *Wilson v. Russ*, 17 Fla. 691; *Griley v. Marion Mortgage Co.*, 132 Fla. 299, 182 So. 297. * * *

And in *Wilson v. Russ*, 17 Fla. 691, 697 (1880) that Court said:

"A trustee in whom is vested the legal estate is a necessary party in all proceedings affecting the estate, where there is a remainderman, for the trustee is liable for the proper care and preservation of the property. (Hill on Trustees, 384, et seq.; *Tiffany and Bullard*, 809, 815.) * * *

The principles established in the leading case of *Shields and others v. Robert R. Barrow*, 58 U. S. (17 How.) 130 (1854) confirm the fact that the Wilmington Trust Company and Delaware Trust Company were indispensable parties in the Florida action. There the Court refused to set aside an agreement of compromise between the payee of a note, the maker and the four endorsers when the payee as plaintiff joined only two of the endorsers as defendants. In holding that the action must be dismissed, the Court pointed out (p. 139):

"The contract of compromise was one entire subject, and from its nature could not be rescinded, so far as respected two of the parties to it, and allowed to stand as to the others."

In the course of its decision the Court laid down the classic definition of indispensable parties at p. 139:

"Persons, who not only have an interest in the controversy, but an interest of such a nature that a final decree cannot be made without either affecting that interest, or leaving the controversy in such a condition that its final determination may be wholly inconsistent with equity and good conscience."

Just as the agreement of compromise was "one entire subject" in the *Shields* case, so also was the trust an indivisible whole in the case *sub judice*. The Florida judgment adjudged that the trust assets passed under Mrs. Donner's will and that her executrix was entitled to the assets for administration in Florida. The judgment did not purport to apply to some of the assets or to any particular persons interested in them. It was intended to apply to the trust assets *in their entirety*, and to *all* persons interested therein. In these circumstances the relationship of Wilmington Trust Company and Delaware Trust Company to the Florida litigation brings them within the *Shields v. Barrow* definition of indispensable parties. Florida has followed *Shields v. Barrow* and has adhered to its indispensable party requirement. *Martinez v. Balbin*, — Fla. —, 76 So. 2d 488, 490 (1954); *Florida Land Rock Phosphate Co. v. Anderson*, 50 Fla. 501, 39 So. 392, 396-397 (1905).

Even assuming that Curtin need not have been joined as a party if jurisdiction had been obtained over the Wilmington Trust Company and Delaware Trust Company, he was obviously an indispensable party in the absence of jurisdiction over the trustees.

In the Absence of Indispensable Parties, Florida Had No Jurisdiction to Render a Judgment Which Was Binding Upon Anyone in Delaware.

The absence of indispensable parties is a jurisdictional defect. This is the law in Florida as it is elsewhere. *Florida Land Rock Phosphate Co. v. Anderson*, 50 Fla. 501, 39 So. 392, 396 (1905); *Martinez v. Balbin*, — Fla. —, 76 So. 2d 488, 490 (1954); *Hartley v. Langkamp*, 243 Pa. 550, 90 Atl. 402, 404 (1914); *Fineman v. Cutler*, 273 Pa. 189, 116 A. 819, 820-821 (1922); *Hymans v. Old Dominion Co.*, 204 Fed. 681, 684 (D. Me. 1913); *Transcontinental & Western Air Inc. v. Farley, et al.*, 71 F. 2d 288, 292 (2d Cir. 1934); *Viking Press, Inc. v. Goldman*, 38 F. Supp. 1014 (S. D. N. Y. 1941); *Ernest v. Fleissner*, 38 F. Supp. 326 (E. D. Wis. 1941);

Massachusetts Farmers Defense Committee v. United States, 26 F. Supp. 941 (D. Mass. 1939); *Krueding v. Chicago Dock & Canal Co.*, 285 Ill. 79, 120 N. E. 478, 479 (1918); *Powell v. Shepard*, 381 Pa. 405, 113 A. 2d 261, 264-265 (1955); *Bank of California Nat. Ass'n. et al. v. Superior Court*, 16 Cal. 2d 516, 522, 105 P. 2d 879, 884 (1940). See *Barney v. Baltimore City*, 6 Wall. (U. S.) 280, 286-7 (1867).

In *Florida Land Rock Phosphate Co. v. Anderson*, 50 Fla. 501, 39 So. 392 (1905) the Supreme Court of Florida acting *sua sponte*, said that if "necessary" parties are absent (p. 396):

" * * * then we cannot adjudicate and determine the controversy, * * * "

More recently, in *Martinez v. Balbin*, — Fla. —, 76 So. 2d 488 (1954) the Supreme Court of Florida termed the lack of indispensable parties a "substantive defect" and asserted that if the omitted parties were truly indispensable (76 So. 2d at 490):

"the defect goes to the substance of appellant's case, for the action cannot proceed without them. * * *"
[Citing *Shields v. Barrow*, 17 How. 129, 135 (1854) and other cases].

In *Hartley v. Langkamp, et al.*, 243 Pa. 550, 90 Atl. 402, 404 (1914) the Pennsylvania Supreme Court adopted as its own the following language from 16 Cyc. 189:

" * * * The rule as to indispensable parties is neither technical nor one of convenience; it goes absolutely to the jurisdiction, and without their presence the court can grant no relief. Thus where the object of a bill is to divest a title to property, the presence of those holding or claiming such title is indispensable. " "

Concerning the collateral vulnerability of a judgment rendered by a court in the absence of indispensable parties

the court in *Bank of California Nat. Ass'n, et al. v. Superior Court*, 16 Cal. 2d 516, 522, 106 P. 2d 879, 884 (1940) said:

"An attempt to adjudicate their rights without joinder is futile. Many cases go so far as to say that the court would have no jurisdiction to proceed without them, and that its purported judgment would be void and subject to collateral attack. * * *"

Similarly, in 48 *Harv. L. Rev.* 995 (1935) the author says at 996:

"In order that the court may render an effective decree which will not be open to collateral attack, all persons are 'necessary' whose rights or duties will inevitably be affected by the decree. * * *"

The erroneous determination by the Florida Supreme Court that it had jurisdiction "over the persons" of Wilmington Trust Company and Delaware Trust Company enabled the Court to escape passing upon their indispensability as parties (R. 192). If Florida had properly held that jurisdiction over the Wilmington Trust Company and Delaware Trust Company was lacking and then faced the question of their indispensability as parties, Florida unquestionably would have held that they were indispensable parties and that their absence constituted a jurisdictional deficiency which required a dismissal of the action as to all parties. The Florida precedents previously cited lead indubitably to this conclusion (*supra*, pp. 23-24).

Since Florida lacked jurisdiction to render the judgment, the judgment was entitled to no faith or credit in Delaware. *Thompson v. Whitman*, 18 Wall. (U. S.) 457 (1873); *Thorman v. Frame*, 176 U. S. 350, 356 (1900); *Thompson v. Thompson*, 226 U. S. 551, 561 (1913); *Estin v. Estin*, 334 U. S. 541, 549 (1948).

2. ASSUMING *ARGUENDO* THAT FLORIDA HAD JURISDICTION TO RENDER THE JUDGMENT, DELAWARE WAS NOT BOUND BY IT.

(a) FLORIDA'S JURISDICTION (IF ANY) TO RENDER THE JUDGMENT WAS ONLY INCIDENTAL TO THE ADMINISTRATION OF THE ESTATE OF A FLORIDA DECEDENT.

A court which has jurisdiction directly to determine an issue can properly decide that issue without regard for the decision of another court which had no jurisdiction to determine the question directly but does so as an incident to resolving another question which it had jurisdiction directly to decide. *RESTATEMENT, JUDGMENTS*, § 71; *Scott "Collateral Estoppel by Judgment"*, 56 *Harv. L. Rev.* 1, 18 (1942). Both the Court of Chancery and the Supreme Court of Delaware relied upon the foregoing principle as one reason (among others) for holding that they were not bound by the Florida judgment (A. 179-180, 241-242).⁶ Their decision in this regard was clearly right.

Florida made no claim that it had jurisdiction directly to pass upon the validity of the trust and the appointments. On the contrary, it held that it had no direct jurisdiction to do so. The court said it had "substantive jurisdiction . . . by virtue of the will, which had been duly probated in Florida." . . . The will, the court said, referred to powers of appointment and this circumstance provided the court

6. Delaware properly held upon the basis of the authorities cited by it that the question before it was not the *res judicata* effect of the Florida judgment, but whether that judgment served as a collateral estoppel in Delaware. Delaware soundly observed that the causes of action involved in the two suits were different in that in Florida the issue was what assets passed under Mrs. Donner's will, whereas in Delaware the question was the validity of the trust and appointments thereunder (A. 241). The Supreme Court of Florida itself commented upon this distinction saying that the Florida action was filed for the purpose "of determining what passes under the residuary clause of the will" (R. 183) while the Delaware action was brought "to determine the validity of the trust agreement" (R. 184).

with "no alternative but to examine the trust instrument and documents executed thereunder and declare them valid or invalid." The court added that so far as its substantive jurisdiction was concerned the case was to be distinguished from one wherein questions of administration or validity of an *inter vivos* trust arose "absent a will or any reference therein" (R. 185). This was tantamount to the Court saying that it had no direct jurisdiction to pass upon the validity of the trust and appointments, but was able to do so simply as an incident to determining what passed under Mrs. Donner's will. Petitioners themselves have thrice recognized that the jurisdiction of Florida was incidental only (Pet. 3, PB. 10, A. 246).

On the other hand, the power of Delaware to determine directly the interests of all claimants, resident or non-resident, in the trust assets located and administered within its borders, has never been challenged.⁷

Because Florida was without jurisdiction to pass directly upon the validity of the trust agreement and appointments, while Delaware had the power directly to resolve these questions, Delaware was not bound by the Florida judgment under the authorities above cited and those cited in the Delaware Vice Chancellor's opinion (*supra* p. 26, A. 181).

Since Florida's jurisdiction to pass upon the validity of the trust and appointments was at best incidental only while Delaware had direct jurisdiction to do so, the full faith and credit clause did not require Delaware to follow the Florida judgment. The purpose of the clause was simply to give the *res judicata* or collateral estoppel effect of a judgment in one state the same effect in every other state. *Magnolia Petroleum Co. v. Hunt*, 320 U. S. 430, 438 (1943); *Riley, Executors v. New York Trust Co., Administrator, et*

7. Jurisdiction was obtained by publication and the mailing of notices to the last known address of the claimants pursuant to an order of the Court of Chancery entered under § 365 of Title 10, Del. C. 1953.

al., 315 U.S. 343, 349 (1942); *United States v. Silliman*, 167 F. 2d 607, 621 (3d Cir. 1948); RESTATEMENT, JUDGMENTS, § 68, Comment "v".

(b) THE FLORIDA JUDGMENT WAS LACKING IN DUE PROCESS AND WAS IN DEROGATION OF THE FULL FAITH AND CREDIT CLAUSE IN THAT BY AN ARBITRARY APPLICATION OF FLORIDA LAW FLORIDA DESTROYED RIGHTS VALIDLY ESTABLISHED UNDER DELAWARE LAW BY A TRUST CREATED AND ADMINISTERED IN DELAWARE WHICH HAD NO SIGNIFICANT RELATIONSHIP TO FLORIDA.

Delaware has held that under its laws the 1935 trust and appointments were valid. Florida reached a contrary conclusion by applying Florida law as the criterion. The Supreme Court of Florida posed as a critical question "the source of the applicable law to test the validity of the attempted trust disposition." (R. 185). Answering this question the court held that Florida law was controlling (R. 187). This, Florida said, was because Mrs. Donner signed the 1949 and 1950 appointments when she was a Florida resident; that such executions were her last effective acts with reference to the trust; that such actions were tantamount to "a republication of the original trust instrument" and that the legal effect was the same as though Mrs. Donner had resided in Florida when the original trust agreement was executed (R. 187).

Florida thus rejected the Delaware view that the execution of a power of appointment in effect writes into the original instrument the names of the appointees as beneficiaries (A. 229, 230, 239); and that in any event the domicile of a settlor is but a minor factor in determining the situs of an *inter vivos* trust (A. 235). In short, Florida refused to adhere to the Delaware law that the domicile of the trustee and the place of trust administration indicate an intention on the part of a settlor to have an *inter vivos* trust governed by Delaware law in the absence of a con-

trary intention manifested by the settlor by circumstances other than his domicile (A. 228-229).

The determination by the Florida court that Florida and not Delaware law controlled the validity of the trust agreement and the appointments thereunder cannot be reconciled with *Hartford Accident & Indemnity Co., et al. v. Delta & Pineland Co.*, 292 U. S. 143 (1934). There, a Mississippi corporation sued a Connecticut corporation in a Mississippi state court to recover upon a fidelity bond written by the defendant. The bond contained a provision limiting the time within which a claim could be asserted and this period had expired. Nevertheless, Mississippi held that plaintiff was entitled to recover since in its view the provision of limitation in the bond was invalid under a statute of Mississippi and its public policy. This Court reversed. It held that inasmuch as the bond had been entered into in Tennessee, and the bond provision limiting the time for the bringing of an action was valid under Tennessee law, Mississippi should have applied Tennessee law to deny recovery rather than Mississippi law to permit recovery, and that the erroneous choice of law by the Mississippi court constituted a denial of due process to the defendant. *This was so, the Court said, even though both parties were doing business in Mississippi and the loss took place in Mississippi.* The Court said (pp. 149-150):

“The contract being a Tennessee contract and lawful in that state, could Mississippi, without deprivation of due process, enlarge the appellant’s obligations by reason of the state’s alleged interest in the transaction? We think not.”

The decision was rested on the premise that Mississippi had but “slight connection” with the substance of the contractual obligation as compared with Tennessee’s interest in it. The Court said that a state (p. 150):

“ . . . may not, on grounds of public policy, ignore a right which had lawfully vested elsewhere, if,

as here, the interest of the forum has but slight connection with the substance of the contract obligations. Here performance at most involved only a casual payment of money in Mississippi. In such a case the question ought to be regarded as a domestic one to be settled by the law of the state where the contract was made. A legislative policy which attempts to draw from the state of the forum control over the contracts elsewhere validly consummated and to convert them for all purposes into contracts of the forum regardless of the relative importance of the interests of the forum as contrasted with those created at the place of the contract, conflicts with the guarantees of the Fourteenth Amendment." [Citing *Home Insurance Co. v. Dick*, 281 U. S. 397, 407-408 (1930) and *Aetna Life Insurance Co. v. Dunken*, 266 U. S. 389, 399 (1924)].

An *inter vivos* trust is a contractual arrangement between settlor and trustee. But unlike an ordinary contract, a trust is by its very nature a local and not an ambulatory entity. For this reason the rationale of the *Hartford Accident* case is particularly apt here. Thus, the Delaware Vice Chancellor said that Delaware was the "home" of the trust (A. 182). The Delaware Supreme Court spoke of Delaware as the trust "situs" (A. 228, 229). Florida itself has referred to the "situs" of a trust and thereby has recognized its localized character. *Henderson v. Usher*, 118 Fla. 688, 160 So. 9, 11 (1935). In this sense it is analogous to the fidelity bond involved in the *Hartford Accident* case.

In the case at bar the roots and relationships of the 1935 trust were essentially in Delaware. The trust agreement was entered into in Delaware. The trust securities were delivered to and the title was vested in the trustee in Delaware. All acts of trust administration took place in Delaware. The trust assets have at all times been located in Delaware. All of the appointments became effective upon delivery of the appointments to the trustee in

Delaware (A. 89-92). The trustee was accountable in the Delaware courts. It was amenable to the Delaware court when a question of construction arose. It was subject to removal by a Delaware court for acts of malfeasance. Delaware courts alone could supervise its administration. RESTATEMENT, CONFLICT OF LAWS § 299. The paramount interest of Delaware in the trust is manifest. Cf. *Mullane v. Central Hanover Bank & Trust Company*, 339 U. S. 306, 313 (1950), where the Court emphasized the fact that each state has an interest, "insistent and rooted in custom," in trusts that "exist by the grace of its laws and are administered under the supervision of its courts."

By every significant standard the trust agreement and the trust administration were intimately tied to Delaware. The fact that Mrs. Hanson as executrix resided in Florida and was the residuary appointee of the trust assets gave Florida at most only a casual and fortuitous connection with it.

The reasoning of the Florida court, if accepted, will have unfortunate consequences. The uniformity of decision which normally results from the permanent application of the law of the situs of a trust will be supplanted by a rule making the validity and construction of every trust vary from time to time depending upon the law of the state in which the settlor resides when the questions arise. Rights fixed by the law of the trust situs will thus be arbitrarily jeopardized by the selection of a residence by a settlor.

Both the Court of Chancery and the Supreme Court of Delaware held that Delaware must be looked to to determine the validity of the trust (A. 182, 244). Florida rejected this approach and by applying Florida law held the trust to be invalid. This choice of law by the Florida court was arbitrary. Its effect was to strike down rights in a Delaware trust validly established under Delaware law having at best only a remote connection with Florida. For this reason the judgment of the Florida court was lacking in due process.

Furthermore, the full faith and credit clause of the Constitution, of necessity, requires the court confronted with the Constitutional requirement to choose the law which it will apply. When the propriety of a judicial choice of law is called into question this Court, it is believed, must be the final arbiter of the question. By its selection of Florida law and its rejection of Delaware law, the Florida court failed to give full faith and credit to the applicable Delaware law which the Constitution required. Jackson, "Full Faith and Credit—The Lawyer's Clause of the Constitution," 45 COL. L. REV. 1, 26-34 (1945). See *Pink v. A. A. A. Highway Express, Inc.*, 314 U. S. 201, 210 (1941); *John Hancock Mutual Life Insurance Co. v. Yates*, 299 U. S. 178, 182 (1936).

Because the Florida judgment was lacking in due process and failed to give full faith and credit to the Delaware law, the Florida judgment was not entitled to full faith and credit in Delaware.

B. The Validity Under Delaware Law of the 1935 Trust and Appointments Is Not Subject to Review by This Court.

Petitioners invoke the appellate jurisdiction of this Court under 28 U. S. C., § 1257(3), (PB. 2), and assert that their petition involves the "meaning and effect" of the full faith and credit clause of the Constitution (PB. 3). But such exhortations will not subject to review by this Court questions of State law. The unequivocal holding by the Delaware Supreme Court that both the 1935 trust agreement and the appointments thereunder were valid under Delaware law (A. 234) (128 A. 2d 819 at 829) was wholly within its power. *Brinkerhoff-Faris Co. v. Hill*, 281 U. S. 673, 680 (1930); *Estin v. Estin*, 334 U. S. 541, 544 (1948); *Yazoo & M. V. R. R. Co. v. Mullins*, 249 U. S. 531, 533 (1919).

Petitioners suggest, however, without citation of authority, that this Court may review that determination

(PB. 23). But, as no federal question was raised by that holding, *Smith v. Adsit*, 23 Wall. (U. S.) 368, 374 (1874),⁸ *Estin v. Estin*, 334 U. S. 541, 544 (1948), *Black v. Cutter Laboratories*, 351 U. S. 292, 299. (1956), petitioners' contention is without merit. It has long been the rule of this Court that it has "no concern" with the disposition made by a State court of questions of local law, *Everett v. Everett*, 215 U. S. 203, 214 (1909), *Kryger v. Wilson*, 242 U. S. 171, 176 (1916), and that power to review decisions of State courts is limited to their decisions on federal questions, *Brinkerhoff-Faris Co. v. Hill*, 281 U. S. 673, 680, 681 (1930); *Skaneateles Water Co. v. Skaneateles*, 184 U. S. 354, 358 (1902); cf. *Quong Ham Wah Co. v. Industrial Comm.*, 255 U. S. 445, 448 (1921). There being no federal question involved, this Court will not review the determination by the Delaware Supreme Court that under Delaware law the trust agreement and appointments thereunder are valid.

CONCLUSION.

For the foregoing reasons the Delaware judgment, it is believed, should be affirmed.

Respectfully submitted,

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Curtin Winsor, Jr.*

8. Justice Strong stated, "What amounts to a trust, or out of what facts a trust may spring, are not Federal questions * * * " 23 Wall. (U. S.) 368, 374 (1874).

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IN THE

Supreme Court of the United States

October Term, 1957.

No. 117.

DORA STEWART LEWIS, MARY WASHINGTON
STEWART BORIE and PAULA BROWNING
DENCKLA,

Petitioners.

v.

ELIZABETH DONNER HANSON, as Executrix and Trustee
under the Last Will of Dora Browning Donner, Deceased, et al.,

Respondents.

On Writ of Certiorari to the Supreme Court of the State
of Delaware.

PETITION FOR REHEARING.

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Petitioners.*

IN THE
Supreme Court of the United States.

OCTOBER TERM, 1957.

No. 117.

DORA STEWART LEWIS, MARY WASHINGTON STEWART BORIE
and PAULA BROWNING DENCKLA,

Petitioners,

v.

ELIZABETH DONNER HANSON, as Executrix and Trustee
Under the Last Will of Dora Browning Donner, De-
ceased,

WILMINGTON TRUST COMPANY, a Delaware Corporation, as
Trustee Under Three Separate Agreements, (1) and
(2) With William H. Donner Dated March 18, 1932 and
March 19, 1932, and (3) With Dora Browning Donner
Dated March 25, 1935,

DELAWARE TRUST COMPANY, a Delaware Corporation, as
Trustee Under Three Separate Agreements; (1) With
William H. Donner Dated August 6, 1940, and (2) and
(3) With Elizabeth Donner Hanson, Both Dated No-
vember 26, 1948,

KATHERINE N. R. DENCKLA,

ROBERT B. WALLS, JR., ESQUIRE, Guardian ad Litem for
Dorothy B. R. Stewart and William Donner Denckla,

ELWYN L. MIDDLETON, Guardian of the Property of Dorothy
B. R. Stewart, a Mentally Ill Person,

EDWIN D. STEEL, JR., ESQUIRE, Guardian ad Litem for
Joseph Donner Winsor, Curtin Winsor, Jr., and Don-
ner Hanson,

BRYN MAWR HOSPITAL, a Pennsylvania Corporation, MIRIAM
V. MOYER, JAMES SMITH, WALTER HAMILTON, DOROTHY
A. DOYLE, RUTH BRENNER and MARY GLACKENS,

LOUISVILLE TRUST COMPANY, a Kentucky Corporation, as
Trustee for Benedict H. Hanson, and as Trustee Under
Agreements With William H. Donner,

WILLIAM DONNER ROOSEVELT, JOHN STEWART and
BENEDICT H. HANSON,

Respondents.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE
STATE OF DELAWARE.

PETITION FOR REHEARING.

The petitioners respectfully submit that they have been aggrieved by the judgment or decision of this Court rendered on June 23, 1958, and petition for a rehearing of said matter.

The grounds of this petition are as follows:

1. This Court erred in holding in *Hanson v. Denckla*, Case No. 107, that the Florida Supreme Court did not have jurisdiction to enter the judgment from which the appeal was taken. The appellees in Case No. 107 have filed a Petition for Rehearing in that case and petitioners herein incorporate by reference the grounds set forth in said Petition for Rehearing in Case No. 107. In the event this Court grants the Petition for Rehearing in Case No. 107, then this Court should grant this Petition for Rehearing, because in the joint opinion delivered on June 23, 1958, in this case and in Case No. 107, the affirmance of the judgment of the Delaware Supreme Court in this case was based upon the reversal of the judgment of the Florida Supreme Court in Case No. 107.

2. In the majority opinion in this case this Court said, "Since Delaware was entitled to conclude that Florida law made the trust company an indispensable party, it was under no obligation to give the Florida judgment any faith and credit—even against parties over whom Florida's jurisdiction was unquestioned". This decision, if not reversed, creates an anomalous situation. This Court has held in effect that the dispute resolved by the Florida Courts between Florida residents is not binding on them because the Delaware trustees (stakeholders) did not choose to enter an appearance and be heard in Florida. On the other hand, the ruling of this Court is that certain of the Florida residents who were parties in the Florida proceedings, but who did not choose to have their rights relitigated in Dela-

ware and, therefore, did not appear and be heard, are bound by the Delaware judgment. Defendants, Katherine N. R. Denckla and Elwyn L. Middleton, Guardian of the Property of Dorothy B. R. Stewart, a Mentally Ill Person, were not served and did not appear in Delaware (A196). These parties whose rights were adjudicated in Florida where they appealed are now told that the decision of their own state is a nullity, but that the decision of a foreign state is binding against them even though they did not appear. The result of the decision of this Court of June 23, 1958, destroys the concepts that full faith and credit and due process are based upon principles of equity and justice. Federal law should not allow the result which will be created if the Petition for Rehearing in this case and the Petition for Rehearing in Case No. 107 are not granted and a different decision reached.

3. We submit that a majority of the members of this Court concluded that the so-called trust agreement was not a true trust, but instead an agency agreement. If so, then we submit that the Florida Court had jurisdiction over the Delaware trustees, under the rule upheld by this Court on July 1, 1958, in denying the appeals in *Columbia Broadcasting System, Inc. v. Atkinson*, No. 756; *Radio Corporation of America v. Anderson*, No. 757; and *American Federation of Musicians v. Atkinson*, No. 759. (Lower court decision, California Supreme Court, 49 A. C. 339). Furthermore, if we are correct in our belief that a majority of the members of this Court were of the opinion that the trust agreement is nothing more than an agency agreement said trustees were properly brought into the Florida Court under the doctrine of *McGee v. International Life Insurance Co.*, 355 U. S. 220.

Could it be that there is a different rule with respect to non-resident parties when a case arises in California affecting a California resident than when a case arises in some other jurisdiction?

Certificate of Counsel

WHEREFORE, and for other reasons appearing in petitioners' briefs previously filed herein, they respectfully petition that a hearing be granted and that the issuance of the mandate of this Court be stayed pending disposition of this petition.

Respectfully submitted,

ARTHUR G. LOGAN,

AUBREY B. LANK,

400 Continental American Building,
Wilmington, Delaware,

*Attorneys for Dora Stewart Lewis,
Mary Washington Stewart Borie
and Paula Browning Denkla,
Petitioners.*

July 15, 1958.

CERTIFICATE OF COUNSEL.

I, Arthur G. Logan of 400 Continental American Building, Wilmington, Delaware, an attorney duly admitted to practice in this Court, do hereby certify that the foregoing Petition for Rehearing is presented in good faith and not for delay.

Dated, July 15, 1958.

ARTHUR G. LOGAN,

Counsel for Petitioners